Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

HOGAN MANAGEMENT SERVICES, P.C.,

Petitioner,

v.

JOSEPH A. MARTINO d/b/a
NORTH GEORGIA ORTHOPAEDICS, P.C.,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Supreme Court

PETITION FOR WRIT OF CERTIORARI

RAFE BANKS III
Counsel of Record
BANKS, STUBBS, NEVILLE & CUNAT
309 Pirkle Ferry Road
Building F
Cumming, Georgia 30040
(770) 887-1209

BAYLOR B. BANKS
BAYLOR B. BANKS, Attorney at Law
3340 Peachtree Road
Suite 325
Atlanta, Georgia 30326
(404) 266-9195

Attorneys for Petitioner
Hogan Management Services, P.C.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

The Georgia Supreme Court's binding precedent holds that unreasonable restrictive covenants ancillary to an agreement classified as a sale of business contract may be partially severed in order to enforce the reasonable portion of those covenants, whereas restrictive covenants ancillary to an agreement classified as an employment contract may not be partially severed in order to achieve reasonable enforcement.

Do due process and/or equal protection under the Fifth and Fourteenth Amendments require that an entity classified as an employer by a Georgia court be allowed to factually demonstrate that the unreasonable restrictive convenants at issue are not the result of an adhesion contract and, if the overbroad restrictive covenants are factually demonstrated to not be the result of an adhesion contract, that a Georgia court be allowed to enforce the reasonable portion of the restrictive covenants through partial severance?

PARTIES TO THE PROCEEDING

Hogan Mangement Services, P.C.

Orthopaedic and Sports Clinic, P.C. (formerly known as Hogan Management Services, P.C.).

Dr. Joseph A. Martino

North Georgia Orthopaedics, P.C.

CORPORATE DISCLOSURE STATEMENT

Orthopaedic and Sports Clinic, P.C. (formerly known as Hogan Management Services, P.C.) has no parent corporation and no publicly held company owns 10% or more of Orthopaedic and Sports Clinic, P.C.'s stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Hogan Management Services, P.C.[1] [hereinafter "Hogan"] respectfully petitions for a writ of certiorari to review the Judgment of the Supreme Court of Georgia. The Georgia Supreme Court erroneously decided that its binding rule of law prohibiting partial severance of restrictive covenants ancillary to employment contracts satisfies federal due process and equal protection requirements.

PROCEDURAL NOTE

This case was initially composed of both Hogan's Complaint and the counterclaim of Respondent Joseph A. Martino d/b/a North Georgia Orthopaedics, P.C. [hereinafter "Martino"] in Civil Action No. 95-CV-26, 154 in the Superior Court of Forsyth County, Georgia. Eventually, after the trial court's dismissal of his Complaint (App. 11-14), Hogan filed an appeal [hereinafter "appeal"] in which the Court of Appeals of Georgia affirmed the dismissal (App. 3-9), and, after the trial court's grant of summary judgment to Hogan on Martino's counterclaim (App. 15-18), Martino filed a cross-

[1] After this case was initiated, Hogan Management Services, P.C. changed its name to Orthopaedic and Sports Clinic, P.C. Throughout the litigation of this case, the corporation has been referred to by both parties as Hogan Management Services, P.C. For the purpose of promoting the issues in this case and avoiding confusion, the corporation is also referred to as Hogan Management Services, P.C. in this petition.

appeal [hereinafter "cross-appeal"], in which the Court of Appeals of Georgia reversed the grant of summary judgment (App. 3-9). The question presented to this Court, as set forth above on page i, is determinative of both the appeal and cross-appeal.

The question presented was determinative of the appeal because both the trial court (App. 11-14) and the Court of Appeals of Georgia (App. 3-6) found that, in regard to the partial severance initially conducted by the trial court (App. 30-32), Georgia's judicial binding precedent absolutely prohibited such partial severance. The question presented was also determinative of the cross-appeal because the Court of Appeals of Georgia held that Hogan was liable to Martino for damages because Georgia's judicial binding precedent made the trial court's initial partial severance of the restrictive covenants "wrongful" (App. 3-6, 9).

Since the question presented was determinative of both the appeal and cross-appeal adversely to Hogan, and the Court of Appeals' judgment handled both the appeal and cross-appeal in the same opinion, Hogan is presenting a single petition for certiorari to this Court with the intention that any ruling from this Court apply to both the appeal and the cross-appeal. If Hogan's procedure regarding this petition is in any way contrary to the Rules of the Supreme Court of the United States, Hogan will be happy to correct any deficiency in accordance with Supreme Court Rule 14.5.

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS

The Georgia Court of Appeals' opinion rendering judgment in both the appeal and the cross-appeal is officially reported as *Hogan Management Services, P.C. v. Martino*, 242 Ga. App. 791, 530 S.E.2d 508 (2000) (App. 3-9). An earlier Georgia Court of Appeals opinion dismissing Hogan Management Services, P.C.'s appeal as premature is officially reported as *Hogan Management Services, P.C. v. Martino*, 225 Ga. App. 168, 483 S.E.2d 148 (1997) (App. 19-21).

The orders of the Georgia Supreme Court denying certiorari in the appeal (App. 2) and the cross-appeal (App. 1) have not been officially reported. The Order of the Georgia Supreme Court transferring this case to the Court of Appeals has not been officially reported (App. 10). The opinions of the Forsyth County Superior Court (App. 11-18, 22-33) have not been officially reported.

BASIS FOR JURISDICTION

I. Date Judgment Entered.

The Georgia Supreme Court transferred this case to the Georgia Court of Appeals on November 2, 1999 (App. 10). The Georgia Court of Appeals entered judgment on March 3, 2000 (App. 3-9). The Georgia Supreme Court denied Hogan's petitions for certiorari in the appeal on July 13, 2000 (App. 2) and the cross-appeal on July 13, 2000 (App. 1).

II. Date of Order Respecting Rehearing.

The Georgia Supreme Court denied Hogan's Motion for Reconsideration of the Georgia Supreme Court's denial of petitions for certiorari in the appeal on July 28, 2000 (App. 35) and the cross-appeal on July 28, 2000 (App. 34).

III. Statute Conferring Jurisdiction.

This Court has jurisdiction of this petition for certiorari pursuant to 28 U.S.C. § 1257(a) (App. 45) because Hogan claims that the Georgia Supreme Court's binding rule of law has deprived it of its Fifth and Fourteenth Amendment due process and equal protection rights.

IV. Statement that Rule 29.4(c) Service Made.

Hogan questions the constitutionality of the Georgia Supreme Court's binding precedent regarding partial severance of restrictive covenants ancillary to employment contracts. Although Hogan questions the constitutionality of a judicial rule of law instead of a legislative statute, 28 U.S.C. § 2403(b) (App. 46) may apply and a copy of this petition is being served upon the Attorney General of the State of Georgia.

CITATION TO CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS IN CASE

Fifth Amendment, United States Constitution (App. 41).

Fourteenth Amendment, United States Constitution (App. 42-43)

Ga. Const. Art. 6, Sec. 6, Par. 2(1) (1983) (App. 44).

28 U.S.C. § 1257(a) (App. 45).

28 U.S.C. § 2403(b) (App. 46).

O.C.G.A. § 9-11-65(c) (1966) (App. 48-50).

O.C.G.A. § 13-3-44(a) (1981) (App. 47).

STATEMENT OF THE CASE

I. Material Facts.

On October 13, 1994, Hogan and Martino signed a written agreement entitled "Independent Contractor Agreement" [hereinafter "Agreement"]. That agreement contains a numbered paragraph 7 entitled *"Covenant Not to Compete"*, which reads as follows:

> In the event of termination of this Agreement, **[Martino] agrees that [Martino] will not, within a period of eighteen (18) months, engage in the practice of medicine or surgery within a radius of ten (10) miles of any practice site(s) at which [Martino] has practiced under this Agreement.** [Martino] agrees that the duration is reasonable and the geographic area is

> reasonable. **[Martino] further agrees not to solicit any patients of [Hogan] to become the patients of [Martino] nor to attempt to influence any employees of [Hogan] to terminate their employment in order to work with [Martino] following termination.** [Martino] understands that violation of this paragraph will cause substantial damage to [Hogan] and that such violation will entitle [Hogan] to apply to any court of competent jurisdiction for equitable or legal relief.

[emphasis added].

That agreement also contains a numbered paragraph 13 entitled *"Governing Law and Severability"*, which reads as follows:

> This Agreement is made in the State of Georgia and shall be construed, interpreted and governed by the laws of the State. In the event that any provision of this Agreement is held invalid or is otherwise unenforceable, the validity and enforceability of all other provisions shall not be impaired.

The parties agree that the employment contract was negotiated, that Martino was represented by legal counsel during negotiations, that the negotiations were "arms-length", that the parties in fact altered the terms of the proposed contract during negotiations, that, during the negotiations, Martino's legal counsel never questioned the reasonableness of the restrictive covenants, and that the above restrictive covenants were not disturbed during negotiations. The parties also agree that no coercion of any kind, whether undue influence or duress, was present during the negotiation of the contract.

It is undisputed that the termination provisions of the Agreement were invoked by written notice to Martino on April 26, 1995. Martino testified that he opened a new office for the practice of orthopaedic medicine on August 1, 1995. Martino's new practice location was within ten miles of the principal Hogan office location on Peachtree Parkway in Cumming, Forsyth County, Georgia and was also within ten miles of Baptist North Hospital located in Cumming, Forsyth county, Georgia, which was the principal surgery site for Hogan and Martino – both of whom are medical doctors practicing orthopaedic surgery. The Hogan practice (located principally at an office on Peachtree Parkway, Cumming, Forsyth County, Georgia) was also conducted from offices located in the Northwoods Medical Center in Cumming, Forsyth County, Georgia, which is precisely the same complex in which Martino opened his new practice.

Hogan filed his Complaint against Martino on August 2, 1995 seeking injunctive relief to enforce the terms of Paragraph 7, and after hearing argument from both parties on August 4, 1995 the trial court entered a temporary restraining order (App. 30-32) in which that court focused on where the parties had actually practiced and partially enforced the agreement by enjoining Martino from practicing medicine or surgery within a radius of ten miles of each of the following three locations: Baptist North Hospital, Hogan's primary office on Peachtree Parkway, and Hogan's satellite Office in Northwoods Medical Center.

On August 11, 1995, Martino answered the Complaint and asserted a counterclaim that Hogan was liable

to Martino for actual damages resulting from the alleged wrongful restraint by the trial court.

In the trial court's Order of October 16, 1995 (App. 23-29), that court dissolved the temporary restraining order and dismissed Hogan's Complaint by finding that the restrictive covenants were unenforceable as being unreasonable and that they could not be "blue-penciled."[2]

On November 15, 1995, Hogan filed a Motion for New Trial; J.N.O.V. and in Arrest of Judgment. The trial court denied that motion on March 21, 1996 (App. 22). Hogan filed a notice of appeal to the Supreme Court on April 8, 1996 in which no constitutionality issues were raised; the Supreme Court then transferred the case to the

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[2] The Georgia Supreme Court has expressly defined the term "blue pencil" as follows: "This term is broadly applied in Georgia to include judicial editing of covenants which were not written in such a way that they are divisible by simply excising certain parts or words from them. *Jenkins v. Jenkins Irrigation, Inc.*, 244 Ga. 95 (3), 101, 259 S.E.2d 47 (1979). See *Howard Schulz & Assoc. v. Broniec*, 239 Ga. 181(3), 236 S.E.2d 265 (1977); Restatement (2d) of Contracts § 184, Reporter's Note (1981); 6A Corbin on Contracts § 1390 (1962)." *White v. Fletcher/Mayo/Associates*, 251 Ga. 203, 204 n.1; 303 S.E.2d 746, 748 n.1 (1983). Thus, the Georgia Supreme Court's use of the term "blue-pencil" can be confusing to non-Georgians because that court has retained the descriptive term for Restatement Contracts § 518 (1932) "blue pencil" severance (in which words in an unreasonable covenant are written through and deleted by a "blue pencil"; if the remaining written words are reasonable and can be enforced, the remainder of the covenant is enforceable) and have applied it to a type of partial severance closely paralleling Restatement (2d) Contracts § 184(2) (1981) "reasonableness" severance.

Court of Appeals. On March 5, 1997, the Court of Appeals dismissed Hogan's appeal as being premature because the trial court had not ruled on Martino's counterclaim for wrongful restraint (App. 19-21).

After remand to the trial court, the trial court issued an order finding that the restrictive covenants were unenforceable as a matter of law (App. 11-14), that Georgia binding precedent precluded the trial court from "blue penciling" the restrictive covenants (App. 12-13), and that the binding precedent was constitutional (App. 13-14). The trial court also issued an order dismissing Martino's counterclaim for wrongful restraint because there had been no security bond in this case (App. 15-18).

On October 18, 1999, Martino filed a cross-appeal regarding his counterclaim in the Georgia Supreme Court. On October 27, 1999, Hogan filed six Enumerations of Error and his Appellant's Brief in the Georgia Supreme Court, contending that the Georgia Supreme Court had jurisdiction pursuant to Ga. Const. Art. 6, Sec. 6, Par. 2(1) because, in Enumeration of Error No. 3, Hogan questioned both the due process and equal protection constitutionality of the rule of law enforced by the trial court in this case, i.e. restrictive covenants ancillary to an employment contract may not be partially severed. Six days later, on November 2, 1999, without addressing the issue of the constitutionality of the rule of law in question, the Georgia Supreme Court transferred the appeal and the cross-appeal to the Court of Appeals of Georgia (App. 10). Hogan moved the Georgia Supreme Court to reconsider the transfer of the appeal and cross-

appeal, but that motion was denied on November 16, 1999 (App. 39-40).

On November 16, 1999, Hogan filed his Cross-Appellee's Response to Cross-Appellant's Brief, in which, using the notion that the most effective defense to a contention that the trial court's restraint had been "wrongful" is to demonstrate that the trial court had actually been correct in initially enjoining Martino, he incorporated by reference all of his points of law relating to the six Enumerations of Error he had filed in his main appeal, including the constitutionality arguments raised in Enumeration of Error No. 3.

In its March 3, 2000 decision, in regard to the underlying appeal, the Court of Appeals of Georgia ruled that the issue of injunctive relief for Hogan was moot and that the merits of Hogan's appeal was moot (App. 5-6). That Court then held that the terms of the restrictive covenants were unenforceable, and that the trial court had no authority to "blue pencil" the restrictive covenants (App. 6). In holding that the trial court had no authority to "blue pencil" the restrictive covenants, the Court of Appeals did not address the issue of whether that rule of law was constitutional in due process and equal protection terms.

In regard to the cross-appeal, the Court of Appeals also held that, because the trial court had found that the restrictive covenants were unenforceable as a matter of law, the trial court's initial restraint of Martino had been "wrongful" (App. 9). The Court of Appeals then held that Hogan was liable to Martino for actual damages, if any, resulting from the wrongful restraint. (App. 9). That

Court then remanded the case back to the trial court for a hearing on damages (App. 9).

The Court of Appeals denied Hogan's Motions for Reconsideration on the appeal (App. 36, 38) and the cross-appeal (App. 36, 37). The Supreme Court denied Hogan's petitions for certiorari on the appeal (App. 2) and the cross-appeal (App. 1), as well as the respective Motions for Reconsideration on those petitions (App. 34, 35).

II. Both Appeal and Cross-Appeal Justiciable Controversies.

The cross-appeal is a justiciable controversy because the Court of Appeals of Georgia used the prohibition against partial severance as a basis for remand to the trial court for a determination of damages for "wrongful" restraint (App. 6, 9).

The appeal is a justiciable controversy because if the binding precedent at issue is found to be unconstitutional, the Georgia Supreme Court would likely look to the legislative public policy contained in O.C.G.A. § 13-3-44(a) (1981) (App. 47) for an acceptable procedure for partial severance. O.C.G.A. § 13-3-44(a) (1981) is a verbatim codification of Restatement (2d) Contracts § 90 (1981), which sets forth the doctrine of modern equitable promissory estoppel. See, 3 Corbin on Contracts §§ 8.1-8.13 (rev. ed. 1996 Holmes). Other jurisdictions applying modern equitable promissory estoppel to restrictive covenants have extended the term of a non-competition agreement beyond its stated expiration date as a way of fashioning appropriate relief in order to avoid

injustice. See, *Thermatool Corporation v. Borzym et al.*, 227 Mich. App. 366, 375, 575 N.W.2d 334, 337-338 (1998), *leave to appeal denied*, 460 Mich. 879, 601 N.W.2d 107 (July 27, 1999).

III. Where Constitutional Issues Raised in Trial and Appellate Courts and How Passed on By Those Courts.

The federal due process and equal protection issues were first raised at the trial court level. The due process arguments were first raised on June 17, 1997 in Hogan's Motion for Revision of the Court's October 16, 1995 Order and Supporting Memorandum. The equal protection issues were first expressly raised on October 17, 1997 in Hogan's Supplement to Motion for Reconsideration of Denial of Injunctive Relief. The trial court initially ruled on these issues in its July 28, 1999 Order (App. 13-14) as follows:

> The Plaintiff maintains that the creation of an irrebuttable presumption that employment contracts are contracts of adhesion in all cases violates the Fifth and Fourteenth Amendments to the United States Constitution. *Vlandis v. Kline*, 412 U.S. 441, 37 L. Ed. 2d 63, 93 S. Ct. 2230 (1972) . . . Georgia common law has held without exception that the Blue Pencil of severability shall not be applied to restrictive covenants ancillary to an employment contract . . . the Court declines to find the numerous prior holdings of the Georgia Supreme Court and Georgia Court of Appeals to be in violation of the Due Process and Equal Protection provisions of the United States and Georgia Constitutions.

At the appellate level, the Supreme Court of Georgia has not directly addressed Hogan's constitutionality arguments. That Court transferred the appeal and the cross-appeal to the Court of Appeals of Georgia. (App. 10). In *Atlanta Independent School System v. Lane*, 266 Ga. 657, 657, 469 S.E.2d 22, 24 (1996), the Georgia Supreme Court overruled all cases which had held that the Supreme Court's transfer of a case to the Court of Appeals constitutes a determination that no constitutional issue has merit. That Court provides two specific reasons why it may transfer a case to the Court of Appeals: (1) the constitutional issue was not raised and ruled upon by the trial court, and (2) the constitutional issue has already been resolved by the Georgia Supreme Court. *Id.*, 266 Ga. at 657-58, 469 S.E.2d at 24. Since the constitutional issues in this case, as shown above, were raised and ruled upon by the trial court, Hogan can only presume that the Georgia Supreme Court believes that it has ruled upon these issues in a prior case and that the prior case stands as Georgia binding precedent for these issues adversely to Hogan; however, the trial court did not cite such a case, Hogan has been unable to locate such a case, and counsel for Martino has not directed Hogan's attention to such a case.

At the appellate level, in regard to the appeal, Hogan first raised the constitutionality questions as the following Enumeration of Error in his Appellant's Brief:

ENUMERATION OF ERROR NO. 3

THE TRIAL COURT ERRED BY FAILING TO FIND THAT THE RULE OF LAW PROHIBITING PARTIAL SEVERANCE OF RESTRICTIVE COVENANTS ANCILLARY TO EMPLOYMENT CONTRACTS VIOLATES THE DUE PROCESS AND EQUAL PROTECTION PROVISIONS OF THE UNITED STATES AND GEORGIA CONSTITUTIONS

Appellant's Brief, p. 5. In regard to the cross-appeal, Hogan first raised these issues by stating, "Hogan hereby incorporates by reference his arguments contained in the entirety of his Appellant's Brief, filed with the Georgia Supreme Court on October 27, 1999, in order to demonstrate that the trial court was initially correct in enjoining Martino." Response to Cross-Appellant's Brief, p. 9.

Hogan also raised his constitutionality arguments to the appellate courts in the following documents: Appellant's Brief, pp. 1, 17-20, Response to Motion to Transfer to Court of Appeals, p. 1, Motion for Reconsideration of Order Transferring Case to Court of Appeals, pp. 1-2, Motion for Reconsideration to Court of Appeals on Cross-Appeal, pp. 12-13, Petition for Certiorari in appeal, pp. 19-22, Petition for Certiorari in cross-appeal, pp. 19-21, 26-27, Motion for Reconsideration of Denial of Petition for Certiorari in the appeal, pp. 6-9, Motion for Reconsideration of Denial of Petition for Certiorari in the cross-appeal, pp. 6-7.

REASONS FOR ALLOWANCE OF WRIT

This case presents a means of constitutionally reviewing Georgia's judicially created public policy of refusing to allow partial severance of restrictive covenants ancillary to employment contracts because of an irrebuttable presumption that such unreasonable restrictive covenants are the product of an adhesion contract. On the other hand, unreasonable restrictive covenants ancillary to business sales are irrebuttably presumed to be the result of a negotiated contract; therefore, such unreasonable restrictive covenants may be partially severed. This binding precedent severely impairs the right of Georgia employers to protect their businesses from harm by former employees. For this reason alone, this case merits a grant of a writ of certiorari.

In addition, other state judiciaries are also distinguishing between employment contracts and business sales. At least one leading contract treatise openly questions whether such a distinction is "logically tenable" (6 Williston on Contracts § 13.13 (4th ed. 1995 Lord), which certainly raises the question whether such a distinction could survive any of the following: strict judicial scrutiny, the lower "arbitrary, capricious or unreasonable" standard associated with substantive due process, or the lower rational basis standard associated with equal protection. This case provides this Court with an opportunity to address this question which impacts employers in many of the States.

Briefly reviewing the existing body of Georgia law and applying that law to the facts of this case demonstrates the fundamental need for this Court to examine

the State of Georgia's distinction between employers and purchasers of businesses.

I. Existing Body of Law.

A. Reasonableness of Restrictive Covenants

In Georgia, an employer "is entitled to protect itself from the risk that a former employee might appropriate customers by taking unfair advantage of the contacts developed while working for the employer." *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 466, 422 S.E.2d 529, 532 (1992). "[A] restrictive covenant contained in an employment contract is considered to be in partial restraint of trade and will be upheld if the restraint imposed is not unreasonable, is founded on a valuable consideration, and is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public. [citation omitted]" *Id.*, 262 Ga. at 465, 422 S.E.2d at 531. "Whether the restraint imposed by the employment contract is reasonable is a question of law for determination by the court [citation omitted]." *Id.* "[T]he area of non-compete clauses is one in which similar clauses beget dissimilar results and each case must be considered on its own particular facts. [citation omitted]" *Colquitt v. Network Rental, Inc.*, 195 Ga. App. 244, 246, 393 S.E.2d 28, 30 (1990).

B. Partial Severance of Restrictive Covenants.

In initially deciding whether it should partially sever unreasonable restrictive covenants ancillary to an employment contract in order to enforce the reasonable

portion of the covenants, the Georgia Supreme Court declined to do so because of a perceived *in terrorem* effect, "[f]or every covenant that finds its way to court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor. . . . [t]here are some good reasons in support of the doctrine of severance. However, we conclude that those reasons are not of sufficient weight to offset those reasons for refusing to apply the doctrine." *Richard P. Rita Personnel Services International, Inc. v. Kot*, 229 Ga. 314, 317-18, 191 S.E.2d 79, 81 (1972).

In 1979, the Georgia Supreme Court permitted partial severance of restrictive covenants ancillary to the sale of a business by finding that, "The reasons for rejecting severability in employment covenants . . . are not applicable to covenants not to compete made in conjunction with the sale of a business." *Jenkins v. Jenkins Irrigation, Inc.*, 244 Ga. 95, 100, 259 S.E.2d 47, 51 (1979).

In 1983, the Georgia Supreme Court held, "In short we do not blue pencil in employment contract cases, but do in sale of business cases. For this reason, if we are confronted with a case challenging the enforceability of a noncompetition covenant, our threshold task is to classify the agreement containing the covenant." *White v. Fletcher/Mayo/Associates, Inc.*, 251 Ga. 203, 206, 303 S.E.2d 746, 749 (1983).

In 1985, the Georgia Supreme Court explained its rationale for distinguishing between business sales and employment contracts, "The rationale behind the distinction in analyzing covenants not to compete is that a

contract of employment inherently involves parties of unequal bargaining power to the extent that the result is often a contract of adhesion. On the other hand, a contract for the sale of a business interest is far more likely to be one entered into by parties of equal footing. [citing *White, supra*]. *Watson v. Waffle House, Inc.*, 253 Ga. 671, 671-72, 324 S.E.2d 175, 177 (1985). *Waffle House* stands today as the rationale for the distinction.

C. Irrebuttable Presumption of Employment Contract as Adhesion Contract

The *Waffle House* rationale effectively creates an irrebuttable presumption that an agreement classified as an employment contract containing unreasonable restrictive covenants is an adhesion contract.

II. Application of Rule of Law to Facts of Case.

The parties agree that *in fact* the contract in this case is not an adhesion contract. Nevertheless, the *Waffle House* rationale compelled the trial court to effectively treat the contract as an adhesion contract and dissolve its temporary restraining order that contained its partial severance of the restrictive covenants, and which has also led the Court of Appeals of Georgia to hold Hogan wholly liable for the trial court's "wrongful" restraint resulting from its partial severance of the restrictive covenants.

III. Need for Constitutional Review of Rule of Law.

This Court has applied strict judicial scrutiny to an irrebuttable presumption when "that presumption is not necessarily or universally true, in fact, and when the state has reasonable alternative means of making the crucial determination." *Vlandis v. Kline*, 412 U.S. 441, 452, 93 S. Ct. 2230, 2236, 37 L. Ed. 2d 63 (1973). This Court later clarified that *Vlandis* did not rest upon procedural due process, *Michael H. v. Gerald D.*, 491 U.S. 110, 120, S. Ct. 2333, 2340, 105 L. Ed. 2d 91 (1989), *reh. den.* 492 U.S. 937, 110 S. Ct. 22, 106 L. Ed. 2d 634 (1989), *2nd reh. den.* 499 U.S. 984, 111 S. Ct. 1645, 113 L. Ed. 2d 739 (1991), *motion to amend den.* 504 U.S. 905, 112 S. Ct. 1931, 118 L. Ed. 2d 538 (1992), but instead stands for the proposition that an irrebuttable presumption must ultimately be analyzed in terms of the " 'fit' between the classification and the policy that the classification serves.", *Id.*, 491 U.S. at 121, 109 S. Ct. at 2341, which suggests that the "fit" of the irrebuttable presumption will determine whether it is subjected to strict scrutiny, the lower "arbitrary, capricious and unreasonable" standard of substantive due process, or the lower "rational basis" standard of equal protection.

A. Strict Scrutiny.

The *Waffle House* rationale, by observing that an employment contract is "often" a contract of adhesion, *Watson v. Waffle House, Inc.*, 253 Ga. 671, 671-72, 324 S.E.2d 175, 177 (1985), demonstrates on its own terms that

it is not necessarily or universally true that an employment contract is an adhesion contract. This Court needs to examine whether a reasonable alternative means of making this determination would be the court's function as a trier of fact, which in this case would be extraordinarily easy because the parties agree that the restrictive covenants did not result from an adhesion contract.

B. Substantive Due Process "Arbitrary, Capricious, and Unreasonable" Standard.

Two state interests are purportedly furthered by the Georgia Supreme Court's rule of law: (1) only reasonable restrictive covenants should be enforced, and (2) unreasonable restrictive covenants resulting from adhesion contracts should not have their reasonable portions enforced by partial severance.

Since the determination of the reasonableness of a restrictive covenant is a question of law reserved for judicial review, it is difficult for parties negotiating restrictive covenants to be confident that the covenants will ultimately be found to be reasonable by a court. Even a distinguished Justice of the Georgia Supreme Court has noted this difficulty as follows: "Ten Philadelphia lawyers could not draft an employer-employee restrictive covenant agreement that would pass muster under the recent rulings of this court. *Fuller v. Kolb*, 238 Ga. 602, 605, 234 S.E.2d 517, 518 (dissent of Justice Jordan) (1977). In light of this acknowledged difficulty, and if this Court were to determine that the lower "arbitrary, capricious, and unreasonable" standard of substantive due process would be the appropriate standard of review, this Court

would need to review whether the absolute prohibition against partial severance of restrictive covenants ancillary to employment contracts is arbitrary, capricious, and unreasonable.

C. Equal Protection Rational Basis Standard.

If this Court were to determine that the rational basis standard of equal protection would be the appropriate standard of review, then this Court would need to review whether there is any rational basis for a Georgia court, sitting as a trier of fact, to be bound by Georgia Supreme Court precedent into ignoring the parties' agreement that the employment contract at issue is not an adhesion contract and imposing an artificial irrebuttable presumption that the contract is an adhesion contract.

CONCLUSION

For the above and foregoing reasons the writ of certiorari should be granted.

RAFE BANKS III
Counsel of Record
BANKS, STUBBS, NEVILLE & CUNAT
309 Pirkle Ferry Road
Building F
Cumming, Georgia 30040
(770) 887-1209

BAYLOR B. BANKS
BAYLOR B. BANKS, Attorney at Law
3340 Peachtree Road
Suite 325
Atlanta, Georgia 30326
(404) 266-9195

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SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: July 13, 2000

Baylor B. Banks
3340 Peachtree Road
Suite 2140
Atlanta GA 30326

Case No. S00C1208

HOGAN MANAGEMENT SERVICES, P.C. v. JOSEPH A. MARTINO, d/b/a NORTH GEORGIA ORTHOPAEDICS

COURT OF APPEALS CASE NO. A00A0611

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

SUPREME COURT OF THE STATE OF GEORGIA

CLERK'S OFFICE

ATLANTA

DATE: July 13, 2000

Baylor B. Banks
3340 Peachtree Road
Suite 2140
Atlanta GA 30326

Case No. S00C1209

HOGAN MANAGEMENT SERVICES, P.C. v. JOSEPH A. MARTINO, d/b/a NORTH GEORGIA ORTHOPAEDICS, P.C.

COURT OF APPEALS CASE NO. A00A0610

The Supreme Court today denied the petition for certiorari in this case.

All the Justices concur.

Sincerely,

Sherie M. Welch, Clerk

FIRST DIVISION
JOHNSON, C. J.,
McMURRAY, P. J., PHIPPS, J

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 37, December 23, 1999)

March 3, 2000

In the Court of Appeals of Georgia

A00A0610, A00A0611. HOGAN MANAGEMENT SERVICES, P.C. v. JO-028 [sic] MARTINO; and vice versa.

JOHNSON, Chief Judge.

In October 1994, Hogan Management Services, P.C.[1], located in Forsyth County, agreed to pay Dr. Joseph Martino for his physician services. The parties' written agreement contains a paragraph entitled "Covenant Not to Compete," which includes both a non-competition clause and a non-solicitation clause. The non-competition clause provides:

> In the event of termination of this Agreement, Provider [Martino] agrees that Provider will not, within a period of eighteen (18) months, engage in the practice of medicine or surgery within a radius of ten (10) miles of any practice site(s) at

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[1] After this lawsuit was filed, Hogan Management Services changed its name to Orthopaedic and Sports Clinic, P.C. Nevertheless, the parties still refer to the corporation as Hogan in their briefs. We therefore shall also refer to the corporation as Hogan in this opinion.

> which Provider has practiced under this Agreement.

The covenant's non-solicitation clause provides:

> Provider further agrees not to solicit any patients of the Corporation [Hogan] to become the patients of Provider nor to attempt to influence any employees of Corporation to terminate their employment in order to work with provider following termination.

Hogan terminated the agreement in April of 1995. And in August of that year, Martino opened his own medical practice in Forsyth County.

The day after Martino opened his office, Hogan filed a lawsuit seeking to enjoin Martino based on his alleged violation of the covenant not to compete. On August 4, 1995, the trial court issued a temporary restraining order against Martino. Martino answered the complaint and filed a counterclaim for damages arising from the allegedly wrongful temporary injunction.

The court held an evidentiary hearing on Hogan's claim for injunctive relief, and on October 16th it denied the claim on the ground that the covenant not to compete is unenforceable. The court found the non-competition clause in the covenant to be unenforceable because the term "practice site(s) " is not defined by the contract and is so ambiguous that Martino had no notice of what would be a violation of the territorial limitation. The court also ruled that the non-solicitation clause in the covenant is unenforceable because it contains no time or territorial limitations, and it is overly broad in that it prohibits the solicitation of any patients regardless of

whether Martino actually had contact with them while working for Hogan. Hogan moved the court to reconsider its ruling, but the court denied the motion.

In April 1996, Hogan appealed the trial court's decision to the Georgia Supreme Court, which transferred the appeal to this court. In March 1997, we dismissed the appeal and remanded the case to the trial court because Martino's counterclaim for damages had not yet been decided, so there was no final appealable judgment as to all issues in the case.

On remand, the trial court dismissed Martino's counterclaim. The court found that because it had not ordered Hogan to post a security bond as a condition of the temporary restraining order, then under OCGA § 9-11-65 (c) Martino could not recover damages from Hogan even if the temporary injunction was wrongful.

Hogan filed the instant appeal, challenging the trial court's finding that the restrictive covenant is unenforceable. And Martino filed a cross-appeal contesting the trial court's dismissal of his counterclaim.

Case No. A00A0610

1. The duration of a covenant not to compete is not tolled during litigation.[2] And when the duration of that covenant has expired, an action seeking injunctive relief pursuant to the covenant is moot.[3]

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[2] *Electronic Data Systems Corp. v. Heinemann*, 268 Ga. 755, 757 (4) (493 SE2d 132) (1997).

[3] *Southern Intermodal Logistics v. Taylor Maid Transp.*, 255 Ga. 390 (338 SE2d 678) (1986).

In this case, the covenant's non-competition clause had a duration of eighteen months from the date the contract was terminated. Hogan terminated the contract on April 26, 1995. The term of the covenant's non-competition clause therefore expired eighteen months later on October 26, 1996. Because the duration of the covenant expired more than three years ago, Hogan's action seeking injunctive relief is now moot, as is this appeal.

Moreover, even if the appeal were not moot, there is no question that the trial court correctly found that the non-solicitation clause in the covenant is overly broad because it has no time limitation, no territorial limitation, and it prohibits Martino from soliciting *any* patient, not only those with whom he actually had contact while working for Hogan.[4] The trial court properly ruled that, in the context of the parties' employment contract, it had no authority to alter or "blue pencil" this unenforceable non-solicitation clause, which thus rendered the entire covenant not to compete unenforceable.[5]

Because Hogan's appeal is moot and because the trial court did not err in finding the entire covenant to be unenforceable, the court's judgment against Hogan on its complaint seeking injunctive relief pursuant to the covenant is affirmed.[6]

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[4] *W.R. Grace & Co. v. Mouyal*, 262 Ga. 464, 465-468 (2) (422 SE2d 529) (1992). Compare *Chaichimansour v. Pets Are People Too*, 226 Ga. App. 69, 70-72 (1) (485 SE2d 248) (1997).

[5] *Ward v. Process Control Corp.*, 247 Ga. 583, 584 (2) (277 SE2d 671) (1981); *Johnstone v. Tom's Amusement Co.*, 228 Ga. App. 296, 297 (1) (491 SE2d 394) (1997)(physical recedent).

[6] See *Southern Intermodal Logistics*, supra; *Windsor-Douglas Assoc. v. Patterson*, 179 Ga. App. 674, 675 (2) (347 SE2d 362) (1986).

2. OCGA § 9-11-65 (c) authorizes a trial court, in its discretion, to require an applicant for a restraining order to post a security bond to pay for any damages that might be suffered by the restrained party if the restraint turns out to be wrongful. That code section provides:

> As a prerequisite to the issuance of a restraining order or an interlocutory injunction, the court may require the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been enjoined or restrained wrongfully.[7]

By authorizing a court to require the posting of a security bond, this code section recognizes that a party who is wrongfully restrained has the right to recover actual damages resulting from that wrongful restraint.[8]

In the instant case, when Hogan sought and obtained a temporary restraining order against Martino, the trial court did not require Hogan to post a security bond. Martino later counterclaimed for damages arising from the allegedly wrongful restraint. But the court eventually dismissed that counterclaim, finding that because it had not required Hogan to post a security bond, Martino is now foreclosed from seeking any damages for the temporary restraint.

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[7] OCGA § 9-11-65 (c).

[8] *Moody v. Harris*, 170 Ga. App. 254, 256 (2) (316 SE2d 781) (1984).

The trial court's finding was incorrect. An applicant for a restraining order does so at its own peril because if it succeeds in obtaining a restraint that is later determined to have been wrongful, then the wrongfully restrained party may recover actual damages caused by that restraint from the applicant.[9] A trial court's decision under OCGA § 9-11-65 (c) to require the giving of a security bond is not a prerequisite to a wrongfully restrained party's right to recover damages. Rather, the posting of a security bond is simply a method by which the court may protect a wrongfully restrained party's rights by ensuring that there is a sum of money to pay any damages. Thus, a court's decision not to require the applicant to give a security bond simply means that a wrongfully restrained party will not have the protection of a secured source of money for its damages, but that decision does not automatically eliminate the applicant's peril that it might later be liable for damages caused by a wrongful restraint. The wrongfully restrained party will still have its right to recover damages; it just will not have a secured source of money from which to make its recovery.

Consequently, the trial court in this case erred in concluding that because it did not order Hogan to post a security bond that Martino has no right to recover any actual damages caused by the wrongful temporary restraint. Martino still has the right to recover any actual damages; he simply does not have a security bond from which to make his recovery. The trial court's dismissal of Martino's counterclaim is thus reversed.

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[9] *Moody v. Harris*, supra.

And because the trial court has already correctly determined that the covenant not to compete upon which the temporary restraint was based is unenforceable, there is no question that the restraint was wrongful. The trial court therefore also erred in not granting summary judgment to Martino on the issue of Hogan's liability for the wrongful restraint. Thus, the only question remaining to be decided on the return of this case to the trial court is the amount of actual damages, if any, suffered by Martino.

Judgment in Case No. A00A0610 affirmed. Judgment in Case No A00A0611 reversed and case remanded with direction. McMurray, P.J., and Phipps, J., concur.

[SEAL] SUPREME COURT OF GEORGIA

Atlanta November 2, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

S00A0132. HOGAN MANAGEMENT SERVICES, P.C. v. JOSEPHA [sic] A. MARTINO, d/b/a NORTH GEORGIA ORTHOPAEDICS, P.C.

S00X0133. [sic] JOSEPHA [sic] A. MARTINO, d/b/a NORTH GEORGIA ORTHOPAEDICS, P.C. v. HOGAN MANAGEMENT SERVICES, P.C.

Upon consideration of the Motion to Transfer filed in these cases, it is ordered that it be hereby granted and the appeals are hereby transferred to the Court of Appeals.

[SEAL]

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Lynn M. Stinchcomb, Chief Deputy Clerk

IN THE SUPERIOR COURT OF FORSYTH COUNTY STATE OF GEORGIA

HOGAN MANAGEMENT SERVICES, P.C.	)	Civil Action No. 95-CV-26,154
Plaintiff,	)	(Filed July 28, 1999)
v.	)	
JOSEPH A. MARTINO, M.D., d/b/a NORTH GEORGIA ORTHOPAEDICS, P.C.	)	
Defendants.	)	

AMENDED ORDER ON MOTION FOR REVISION OF INTERLOCUTORY ORDER

Plaintiff requests this Court to Reconsider its October 16, 1995 order denying its request for an Interlocutory Injunction. The Court has previously ruled that the covenants not to compete and solicit contained in an employment contract between the parties are unenforceable as a matter of law.[1] OCGA 9-11-60(g) provides that clerical mistakes in orders may be corrected at any time by the Court on its own initiative. The Court entered a prior order with respect to this motion on June 29, 1999. This order hereby supercedes the findings of fact and conclusions of law contained within the prior order of the court. With respect to this Motion, the Court finds as follows:

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[1] For further explanation, see Order of October 16, 1995, Civil Action File No. 95-CV-26,154.

1.

The Plaintiff maintains that if the covenants are unenforceable as written, the Defendants are bound by their terms under the doctrine of Equitable Estoppel. However, "neither ratification nor estoppel can result from a contract which is void as against public policy." *Milton Frank Allen Publications, Inc. v. Georgia Association of Petroleum Retailers, Inc.*, 224 Ga. 518 (162 S.E.2d 724, 730) (1968). Therefore, the doctrine of Equitable Estoppel is not applicable to the case at hand.

2.

The Plaintiff also argues that this Court has the authority under Georgia law to redraft or "blue pencil" these covenants into a legally enforceable form. "When a portion of a covenant not to compete which is a part of a sale of business interest is found to be unreasonable, the court has tended nevertheless to uphold the remaining portions of the covenant by "Blue Penciling" or severing the overly broad restrictions. On the other hand, the court has found covenants not to compete which are part of a contract of employment to be non-severable and has held that overbreadth of one portion of the covenant so taints the entire covenant as to make it unenforceable." *Watson et al. v. Waffle House, Inc.*, 253 Ga. 671, 672 (324 S.E.2d 175) (1985); "In short, we do not blue pencil in employment contract cases, but do in sale of business cases." *White v. Fletcher/Mayo/Associates, Inc.*, 251 Ga. 203 (303 S.E.2d 724) (1968). This doctrine has an extensive history in the appellate courts of our state. See e.g. *Rita Personnel Services v. Kot*, 229 Ga. 314 (191 S.E.2d 79) (1972); *Roberts v.*

Tifton Medical Clinic, 206 Ga.App. 612, 615 (426 S.E.2d 188) (1992); *Smith v. HBT, Inc.*, 213 Ga.App. 560 (445 S.E.2d 315) (1994); *Habif, Arogeti & Wynne, P.C. v. Baggett et al.*, 231 Ga.App. 289 (498 S.E.2d 346) (1998).

3.

The Plaintiff maintains that the creation of an irrebutable presumption that employment contracts are contracts of adhesion in all cases violates the Fifth and Fourteenth Amendments to the United States Constitution. *Vlandis v. Kline*, 412 U.S. 441, 37 L.Ed.2d 63, 93 S.Ct. 2230 (1972).[2] Although not directly addressing the constitutional question raised by the Plaintiff, the Supreme Court has previously recognized the possibility that not all employment contracts are contracts of adhesion but declined to adopt a policy of "partial severance" of restrictive covenants as suggested by Harlan M. Blake, 73 Harv. L. Rev. 625 (February 1960). *White v. Fletcher/Mayo/Associates, Inc.*, 251 Ga. 203 (303 S.E.2d 724) (1968) (footnote 2); *Rita Personnel Services v. Kot*, 229 Ga. 314 (191 S.E.2d 79) (1972). Georgia common law has held without exception that the Blue Pencil theory of severability shall not be applied to restrictive covenants ancillary to an

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[2] The United States Supreme Court invalidated a Connecticut statute which provided no means for university students who applied from out of state to demonstrate that they had become residents for purposes of obtaining reduced in-state tuition. The Court held that an irrebutable presumption of non-residence violated the Fifth and Fourteenth Amendments to the United States Constitution. *Vlandis*, at 453.

employment contract. Any argument as to the constitutionality of this doctrine should be addressed directly to the appellate courts of this state. Therefore, the Court declines to find the numerous prior holdings of the Georgia Supreme Court and Georgia Court of Appeals to be in violation of the Due Process and Equal Protection Provisions of the Untied States and Georgia Constitutions.

4.

For the reasons stated above, the Plaintiff's Motion for Revision of the Interlocutory Order is hereby denied.

SO ORDERED, this 28 day of July, 1999.

/s/ Richard S. Gault
Richard S. Gault, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

cc: Clerk of Court (Original)
Rafe Banks, Esq.
Baylor Banks, Esq.
David L. Moss, Esq.
Jefferson, Kirby, Esq.

IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

HOGAN MANAGEMENT SERVICES, P.C.	)	
Plaintiff,	)	Civil Action No. 95-CV-26,154
v.	)	
JOSEPH A. MARTINO, M.D. d/b/a NORTH GEORGIA ORTHOPAEDICS, P.C.	)	
Defendants.	)	

ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

(Filed June 29, 1999)

The Plaintiff filed the above styled Complaint for Injunctive Relief seeking to enforce a Covenant not to Compete and Covenant Not to Solicit contained within an employment contract between the parties. On August 5, 1995, this Court granted a Temporary Restraining Order preventing the Defendant from practicing medicine or surgery within ten (10) miles of three facilities operated by the Plaintiff in Forsyth County. However, on October 16, 1995, this Court denied the Plaintiff's request for Interlocutory Relief finding that the covenants at issue were not enforceable as a matter of law. The Defendant filed a Counterclaim seeking damages for lost income during the period of the Temporary Restraining Order.

On March 5, 1996, the Court of Appeals dismissed Plaintiff's appeal of the Interlocutory Order as premature finding that no final judgment had been rendered by the trial court. The parties have since filed Cross Motions for Summary Judgment as to Defendant's Counterclaim.

1.

The Defendant seeks damages alleging that the Plaintiff wrongfully sought out a Temporary Restraining Order from the Court. In support of its claim, the Defendant cites OCGA § 9-11-65(c) which provides as follows:

> As a prerequisite to the issuance of a restraining order or an interlocutory injunction, the court may require the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been enjoined or restrained wrongfully. A surety upon a bond or undertaking under this Code section submits himself to the jurisdiction of the court and irrevocable [sic] appoints the clerk of the court as his agent whom any papers affecting his liability on the bond or undertaking may be served. . . . OCGA § 9-11-65(c).

2.

"OCGA § 9-11-65(c) recognizes the right to recover actual damages resulting from a wrongful restraint, by requiring the applicant to give security against such damages." *Moody et al, v. Harris et al.*, 170 Ga.App. 254 (316 S.E.2d 781) (1984). By its own terms, OCGA § 9-11-65(c)

provides a basis for relief only where the court has granted a request for a security bond prior to the issuance of a restraining order or injunction. At the hearing on the Temporary Restraining Order, this Court denied the Defendant's request for a security bond. Therefore, OCGA § 9-11-65(c) does not provide a basis for relief in Defendant's Counterclaim.

3.

Article V of Title 51 establishes the tort of Abusive Litigation. OCGA § 51-7-80 et seq. On or after April 3, 1989, no claim other than as provided in this article or in Code Section 9-15-14 shall be allowed, whether statutory or common law, for the torts of malicious use of civil proceedings, malicious abuse of civil process, nor abusive litigation, provided that claim filed prior to such date shall not be affected. This article is the exclusive remedy for abusive litigation. OCGA § 51-7-85.

4.

An action or claim under this article requires the final termination of the proceeding in which the alleged abusive litigation occurred and must be brought within one year of the date of final termination. OCGA § 51-7-84(b). A claim Abusive Litigation cannot be brought by counterclaim in the initial proceeding and should only be brought at the conclusion of the above styled case. As the Counterclaim has been prematurely filed, the Court declines to address the merits of the Defendant's allegations at this time. The Plaintiff's Motion for Summary

Judgment as to the Defendant's Counterclaim is hereby granted.

SO ORDERED, this 29 day of June, 1999.

/s/ Richard S. Gault
Richard S. Gault, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

For the reasons stated above, the Plaintiff's Motion for Revision of the Interlocutory Order is hereby denied.

SO ORDERED, this 29 day of June, 1999.

/s/ Richard S. Gault
Richard S. Gault, Judge
Forsyth County Superior Court
Bell-Forsyth Judicial Circuit

cc: Clerk of Court (Original)
Rafe Banks, Esq.
Baylor Banks, Esq.
David L. Moss, Esq.
Jefferson Kirby, Esq.

FIRST DIVISION
McMURRAY, P.J.,
JOHNSON and RUFFIN, JJ.

NOTICE: *MOTIONS FOR RECONSIDERATION MUST BE RECEIVED IN OUR CLERK'S OFFICE WITHIN TEN DAYS OF THE DATE OF DECISION* to be deemed timely filed. (Court of Appeals Rules 4 and 37, January 1, 1995)

March 5, 1997

In the Court of Appeals of Georgia

A96A1902. HOGAN MANAGEMENT SERVICES, P. C. V. MARTINO. Mc-122

McMURRAY, Presiding Judge.

Hogan Management Services, P. C. ("Hogan") filed an action against Joseph A. Martino, M. D., d/b/a North Georgia Orthopaedics, P. C. ("North Georgia"), alleging Martino violated two restrictive covenants in a medical services contract entitled, "INDEPENDENT CONTRACTOR AGREEMENT." After the trial court entered an order temporarily restraining Martino from practicing medicine or surgery within certain geographical limits, Martino and North Georgia filed an answer alleging the restrictive covenants are unenforceable and Martino asserted a counter-claim contending Hogan wrongfully sought and obtained the temporary restraining order. Hogan later filed a motion for judgment on the pleadings and an amended motion for judgment on the pleadings. Martino also filed a motion to dismiss the complaint.

After conducting a hearing, the trial court entered an order (judgment) dismissing Hogan's complaint on October 16, 1995, concluding "that the restrictive covenants are void and unenforceable as a matter of law." Following

the denial of its motion for new trial, judgment notwithstanding the verdict and in arrest of judgment, Hogan filed a notice of appeal to the Georgia Supreme Court. The Supreme Court transferred the appeal to the Georgia Court of Appeals for consideration. *Held*:

1. Hogan's motion entitled, "MOTION FOR RECONSIDERATION AND RESCISSION OF TRANSFER BY SUPREME COURT AND FOR TRANSFER FROM COURT OF APPEALS TO SUPREME COURT," is hereby denied. "We comply with the Supreme Court's transfer order and [review this appeal] because Art. VI, Sec. VI, Par. VI of the Georgia Constitution of 1983 provides that '(t)he decisions of the Supreme Court shall bind all other courts as precedents.' See *Crotty v. Crotty*, 219 Ga. App. 408, 409 (1) (465 SE2d 517)." *Board of Trustees of the Fulton County Employees Retirement System v. Mabry*, 221 Ga. App. 762, 763 (note 3) (472 SE2d 542). We are compelled, however, to dismiss the case sub judice for lack of jurisdiction.

2. In "a case ' "involving multiple . . . claims, a decision adjudicating fewer than all the claims . . . is not a final judgment. (Cit.) In such circumstances, there must be an express determination [that there is no just reason for delay and express direction for the entry of judgment] under OCGA § 9-11-54 (b) ((cit.)) or there must be compliance with the [certificate of immediate review] requirements of OCGA § 5-6-34 (b) ((cit.)). Where neither of these code sections (is) followed . . . , the appeal is premature and must be dismissed." ' *Patrick v. Glass*, 188 Ga. App. 737 (374 SE2d 229)." *Whidden v. Stargell*, 192 Ga. App. 826, 827 (386 SE2d 884). The order appealed in the case sub judice did not constitute a final judgment

because the order merely dismissed the complaint but did not dispose of the counterclaim asserted by Martino. The record before this Court does not contain a judgment or voluntary dismissal concerning the counterclaim and the clerk of the trial [sic] court informs this Court that there is no such judgment or dismissal. Because Martino's counterclaim remains pending in the trial court, Hogan's direct appeal is premature. This, coupled with Hogan's failure to follow the interlocutory appeal procedures under OCGA § 5-6-34 (b), is insufficient to provide this Court with jurisdiction to consider the case sub judice. Accordingly, this direct appeal is hereby dismissed. See *Union Indemnity Insurance company of New York v. Cherokee Insurance Company*, 168 Ga. App. 82, 83 (308) SE2d 238).

Appeal dismissed. Johnson and Ruffin, JJ., concur.

SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

HOGAN MANAGEMENT SERVICES, P.C. Plaintiff, v. JOSEPH A. MARTINO, M.D., d/b/a NORTH GEORGIA ORTHOPAEDICS, P.C. Defendant.	)	CIVIL ACTION FILE NO. 95-26,154

ORDER

This cause came on to be heard on March 14, 1996 before the Honorable Richard S. Gault, Judge of the Superior Court of Forsyth County, Georgia, on the Plaintiff's Motion for New Trial; J.N.O.V. and in Arrest of Judgment. After review of the pleadings, and after hearing the argument of counsel, it is hereby

ORDERED that the Plaintiff's Motion for New Trial; J.N.O.V. and in Arrest of Judgment be DENIED.

This 21 day of March, 1996.

/s/ Richard S. Gault
Honorable Richard S. Gault
Judge, Superior Court of
Forsyth County

SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

HOGAN MANAGEMENT SERVICES, P.C.	)	
Plaintiff,	)	CIVIL ACTION FILE NO. 95-26, 154
v.	)	
JOSEPH A. MARTINO, M.D. d/b/a NORTH GEORGIA ORTHOPAEDICS, P.C.	)	
Defendants.	)	

ORDER

(Filed Oct. 16, 1995)

This action was brought by Plaintiff Hogan Management Services, P.C. ("Hogan") against Defendants Joseph A. Martino, Jr., M.D. ("Dr. Martino") and North Georgia Orthopedics, P.C. ("NGO") for alleged breach of restrictive covenants contained in an independent contractor agreement) (the "Contract") on August 2, 1995. After a hearing on August 4, 1995, the Court entered a temporary restraining order. The Defendants Answered the Complaint alleging that the restrictive covenants were unenforceable as a matter of law, and raising the affirmative defenses of breach of contract, fraud, unclean hands and estoppel.

The matter came on for hearing on September 5, 1995 to determine whether it is appropriate for the Court to grant an interlocutory injunction against Defendants.

Upon reviewing the pleadings and the evidence submitted by the parties, and upon considering the arguments of counsel, the Court makes the following Findings of Fact and enters the following Conclusion of Law.

FINDINGS OF FACT

The Contract contains two restrictions: (a) a covenant not to compete, and (b) a covenant not to solicit. They are contained in Paragraph 7 which provides in pertinent part:

> 7. *Covenant Not to Compete.* In the event of termination of this Agreement, Provider agrees that Provider will not, within a period of eighteen (18) months, engage in the practice of medicine or surgery within a radius of ten (10) miles of any *practice site(s)* at which Provider has practiced under this Agreement. Provider agrees that the duration is reasonable and the geographic area is reasonable. Provider further agrees not to solicit *any patients of the Corporation* to become the patients of Provider . . . (emphasis added)

The Contract does not involve the sale of a business. Paragraphs 11 and 12 of the Contract expressly state that the Contract is not intended to create a partnership or joint venture between Plaintiff and Defendants. Defendants acquired no equity interest in Plaintiff. The Contract does not contain any buy-in provision. The evidence shows that Defendants held no official status with Plaintiff, were not owners of or shareholders in Plaintiff, and had no voting rights in Plaintiff. Defendants had no authority to hire or fire employees. Defendants had their

benefits and responsibilities established by the Contract. There were no reciprocal restrictive covenants extracted from Plaintiff or its sole physician employee, Dr. Hogan.

CONCLUSIONS OF LAW

The Court concludes that the restrictive covenants contained in Paragraph 7 of the Contract are unenforceable as a matter of law. A contract in general restraint of trade which tends to lessen competition is against public policy and is void. Ga. Const. Art. III, Sec. IV, Para. V(C) (1983); O.C.G.A. § 13-8-2. Restrictive covenants contained in employment contracts are considered to be in partial restraint of trade and will be upheld only if the restraint imposed is not unreasonable, is founded on a valuable consideration, is reasonably necessary to protect the interest of the party in whose favor it is imposed, and does not unduly prejudice the interests of the public. *W.R. Grace & Co. v. Mouval*, 262 Ga. 464, 422 S.E.2d 529 (1992).

In determining the reasonableness of restrictive covenants, consideration must be given to the employee's ability to determine *with certainty* at the formation of the agreement the area within which his post-employment actions are restricted. *Id.* at 531-32; *Durham v. Stand-By-Labor*, 230 Ga. 552, 198 S.E.2d 145 (1973). The Court also considers the nature and extent of the trade or business, the situation of the parties, and all other circumstances. *W. R. Grace & Co., supra.* A three-element test of duration, territorial coverage and scope of activity has evolved as a helpful tool in examining the reasonableness of the particular factual setting to which it is applied. *Id.* To be

enforceable, restrictive covenants must be strictly limited in time, territorial effect and scope of activity prohibited. *Kroger Properties v. Adams-Cates Company*, 247 Ga. 68, 274 S.E.2d 329 (1981). A restrictive covenant is unenforceable as an unreasonable restraint on trade if it is *indefinite* or if it is *overbroad* as to time, territorial limitation or scope of activities prohibited. *See Orkin Exterminating Co. v. Walker*, 251 Ga. 536, 307 S.E.2d 914 (1983); *Wolfhorst v. Hudgens & Co.*, 231 Ga. 170, 200 S.E.2d 743 (1973); *Ellison v. Labor Pool of America, Inc.*, 228 Ga. 147, 184 S.E.2d 572, 575 (1971).

1. The Covenant Not to Compete

The Court finds that the duration of eighteen months is definite and reasonable. The Court also finds that the scope of activity, which is the practice of medicine or surgery, is a reasonable scope of prohibited activity. The issue is whether the term "practice site(s)" was sufficiently specific and definite at the time the Contract was entered into for Defendants to determine with certainty the territorial restriction. *W.R. Grace*, 422 S.E.2d at 531-32; *Wiley v. Royal Cup*, 258 Ga. 357, 358, 370 S.E.2d 744 (1988); *Koger Properties*, 274 S.E.2d at 329; *Durham*, 198 S.E.2d at 149; *Ellison*, 184 S.E.2d at 575.

The term "practice site(s)" is ambiguous in that it is subject to at least two interpretations. Under either one, the number and location of practice sites can only be determined once the Contract is terminated, and the parties "look back" to determine the offices managed and operated by Plaintiff, or where Dr. Martino "practiced medicine" during the term of the Contract. Since the number and location of applicable practice sites could not

be determined with certainty at the time of the formation of the Contract, the non-compete clause fails to specify with particularity the territory in which Defendants are intended to be restricted, and fails to put Defendants on notice of what constitutes a post-employment violation of the restrictive covenant. It makes no difference that Plaintiff chooses now to limit application of the term to offices in Forsyth County. Such limitation is not expressed in the Contract and cannot be considered by the Court. *See Osta v. Moran*, 208 Ga. App. 544, 430 S.E.2d 837, 839 n.3 (1993).

2. The Non-Solicitation Clause

The non-solicitation clause of the Contract is vague, overbroad and unenforceable. The non-solicitation clause provides in pertinent part that "Provider further agrees not to solicit any patients of the Corporation to become the patients of Provider. . . . " The non-solicitation clause does not have a territorial limit expressed in geographic terms. The only limitation on its territorial application is that it prohibits solicitation of "*any* patients of the Corporation."

An employer has a protectable interest in the customer relationships its former employee established and/or nurtured while employed by the employer, and is entitled to protect itself from the risk that a former employee might appropriate customers by taking unfair advantage of the contacts developed while working for the employer. *W. R. Grace*, 422 S.E.2d at 532. However, a prohibition against solicitation of *any* of an employer's customers, whether or not a relationship existed between the customer and the former employee, is overbroad. *See*

American Software U.S.A., Inc. v. Moore, 264 Ga. 480, 448 S.E.2d 206, 209 (1994); *W. R. Grace, supra*. Former employees have no unfair competitive advantage regarding customers with whom they did not work and had no business relationship while employed with the former employer. *Dougherty, McKinnon & Luby, P.C. v. Greenwald, Denzik & Davis, P.C.*, 213 Ga. App. 891, 447 S.E.2d 94, 96 (1994) Also, a prohibition against post-employment solicitation of *any* customer of the employer, even if confined to a specific geographic area, is an unreasonable and overbroad attempt to protect the employer's interest in avoiding all competition. *W.R. Grace*, 422 S.E.2d at 532 *citing Orkin Exterminating, supra* and *Singer v. Habif, Arogeti & Wynne*, 250 Ga. 376, 297 S.E.2d 473 (1982).

In this case, the non-solicitation clause, by its express terms, prohibits solicitation of "*any* patients of the Corporation." It is not limited to those patients with whom Defendants had contact during their tenure, nor is it limited to the patients of Plaintiff seen at Plaintiff's offices, or seen during Defendants' tenure with Plaintiff. Therefore, the non-solicitation clause is overbroad and unenforceable.

Moreover, the non-solicitation clause contains no time limitation and it is unenforceable on its face. *Marcoin, Inc. v. Waldron*, 244 Ga. 169, 259 S.E.2d 433, 434 (1979).

Georgia courts construe covenants not to compete and covenants not to solicit together. They cannot be severed and neither covenant can be "blue-penciled." If the covenant not to solicit is void, the covenant not to compete also is void and vice versa. *Ward v. Process*

Control Corp., 247 Ga. 583, 277 S.E.2d 671 (1981); *Uni-Worth Enterprises, Inc. v. Wilson*, 244 Ga. 636, 261 S.E.2d 572, 575 (1979).

CONCLUSION

The Court finds that the restrictive covenants are void and unenforceable as a matter of law. The Court further finds that the equitable remedy of injunction is unavailable to Plaintiff for any breach of the restrictive covenants. Accordingly, it is hereby ORDERED that the temporary restraining order dated August 4, 1995 is dissolved, and Plaintiff's Compliant is DISMISSED.

This 16 day of October, 1995.

/s/ Richard S. Gault
HONORABLE RICHARD S. GAULT
Superior Court of Forsyth County
Blue Ridge Judicial Circuit

Original: Clerk of Court

cc: Rafe Banks, III
David L. Moss

IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

HOGAN MANAGEMENT SERVICES, P.C.

Plaintiff

vs.

JOSEPH A. MARTINO, M.D., d/b/a NORTH GEORGIA ORTHOPAEDICS, P.C.

Defendant

CIVIL ACTION FILE

NO. 95-26,154

TEMPORARY RESTRAINING ORDER

(Filed Aug. 4, 1995)

This case was filed on August 2, 1995. A hearing was scheduled and held at 4:00 p.m. for August 3, 1995. All parties and their attorneys appeared for argument on plaintiff's request for a temporary restraining order restricting defendants from engaging in the practice of medicine or surgery within a radius of ten (10) miles of any practice sites at which defendants have practiced within Forsyth County, Georgia, and to prevent defendants from soliciting any patients of plaintiff seen during the time when plaintiff and defendants practiced medicine together.

Defendants have filed a Motion To Dismiss raising numerous issues. The only issues which the Court believes are appropriate for discussion in determining whether to issue a temporary restraining order, are whether the Independent Contractor Agreement (hereinafter "Agreement") attached to the pleadings of all

parties is enforceable as a matter of law generally, and specifically, whether it applies to Defendant Martino personally.

The Court finds that, since Dr. Martino was the only physician employed by North Georgia Orthopaedics, P.C. and, according the Agreement, was the only physician who could practice medicine for North Georgia Orthopedics [sic] pursuant to the Agreement, Dr. Martino personally is subject to the Agreement if it is enforceable as a matter of law. The fact that Dr. Martino signed the Agreement as President of North Georgia Orthopaedics, P.C. only is not a basis for dismissal of the action.

Defendants also object to the enforceability of the agreement on the ground that there is no time period restricting solicitation of plaintiff's patients. However, the Court finds that the eighteen (18) month time period in paragraph 7 of the Agreement covers not only the covenant not to compete but also the restriction on solicitation. The Court further finds that the eighteen (18) month time period is not unreasonable and is appropriate for the protection of plaintiff.

Defendants also complain that the geographical area set forth in paragraph 7 of the Agreement is vague and ambiguous. The Court disagrees. The geographical radius is defined as "within a radius of ten (10) miles of any practice site(s) at which [Defendants] ha[ve] practiced under this Agreement." Plaintiff has only requested that the covenant not to compete be enforced within practice sites within Forsyth County. Defendant complains that that limited request for enforcement indicates the ambiguity of paragraph 7. The Court disagrees and finds that

the language set forth in the Agreement is not vague or ambiguous in that defendants know where they have practiced in Forsyth County and similar language has been upheld recently in the cases of *Cobb Family Dentistry v. Wright*, 259 Ga. 450 (1989) and *Roberts v. Tifton Medical Clinic, P.C.*, 206 Ga App. 612 (1992).

Accordingly, until a hearing on an interlocutory injunction can be held, IT IS HEREBY ORDERED that defendants are hereby temporarily enjoined from engaging in the practice of medicine or surgery within a radius of ten (10) miles of Baptist North Hospital, 123 Samaritan Drive, Cumming, Forsyth County, Georgia 30131; 610 Peachtree Parkway, Cumming, Georgia 30131; and Northwoods Medical Center, 1230 Bald Ridge Marina Road, Cumming, Georgia 30131. Also, until a hearing on an interlocutory injunction can be held, IT IS FURTHER ORDERED that defendants are further enjoined from soliciting any patients seen by plaintiff or defendants during the term of their association, that is, October 1, 1994, through July 31, 1995. This matter will be set for an Interlocutory Hearing during the week of August 14, 1995, at a time and place set by the Court and communicated to the parties.

This Temporary Restraining Order is entered this 3 day of August, 1995, at 4:45 p.m.

/s/ Richard S. Gault
HONORABLE RICHARD S. GAULT
Superior Court of Forsyth County
Blue Ridge Judicial Circuit

Prepared by:

Robert S. Stubbs III
Georgia Bar No. 689820
Suite 200
110 Old Buford Road
Cumming, Georgia 30130
(770) 887-1209

SUPREME COURT OF GEORGIA

Case No. S00C1208 Atlanta, July 28, 2000

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HOGAN MANAGEMENT SERVICES, P.C. v. JOSEPH A. MARTINO, d/b/ GEORGIA ORTHOPAEDICS

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

SUPREME COURT OF GEORGIA

Case No. S00C1209 Atlanta, July 28, 2000

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HOGAN MANAGEMENT SERVICES, P.C. v. JOSEPH A. MARTINO, d/b/ GEORGIA ORTHOPAEDICS, P.C.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sherie M. Welch, Clerk.

Court of Appeals
of the State of Georgia

ATLANTA, MAR 28 2000

The Court of Appeals hereby passes the following order:

A00A0610, A00A0611. HOGAN MANAGEMENT SERVICES, P.C. v. MARTINO; AND VICE VERSA.

Upon consideration of Hogan Management Services' motions for leave to file a second motion for reconsideration in each of the above styled cases, it is hereby ordered that said motions are denied. Motions for permission to file supplemental brief and second motions for reconsideration are hereby dismissed as MOOT.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk,

/s/ William R. Martin

Court of Appeals
of the State of Georgia

ATLANTA, MARCH 16, 2000

The Court of Appeals hereby passes the following order:

Case No. A00A0611

JOSEPH A. MARTINO D/B/A NORTH GEORGIA ORTHOPAEDICS V. HOGAN MANAGEMENT SERVICES, P. C.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk,

/s/ William R. Martin

Court of Appeals
of the State of Georgia

ATLANTA, MARCH 16, 2000

The Court of Appeals hereby passes the following order:

Case No. A00A0610

HOGAN MANAGEMENT SERVICES, P. C. V. JOSEPH A. MARTINO D/B/A NORTH GEORGIA ORTHOPAEDICS, P.C.

Upon consideration of the motion for reconsideration filed in this case, it is ordered that it be hereby denied.

Court of Appeals of the State of Georgia

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk,

/s/ William R. Martin

SUPREME COURT OF GEORGIA

Case No. S00X0133 Atlanta, November 15, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

JOSEPH A. MARTINO, d/b/a NORTH GEORGIA ORTHOPAEDICS, P.C. v MANAGEMENT SERVICES, P.C.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sharie [sic] *M. Welch,* Clerk.

SUPREME COURT OF GEORGIA

Case No. S00A0132 Atlanta, November 15, 1999

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

HOGAN MANAGEMENT SERVICES, P.C. v. JOSEPH A MARTINO, d/b/a NORTH GEORGIA ORTHOPAEDICS, P.C.

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Sharie [sic] *M. Welch,* Clerk.

U.S. CONSTITUTION

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age is such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer

of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall hāve engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Ga. Const. Art. 6, Sec. 6, Par. 2(1) (1983).

Paragraph II. Exclusive appellate jurisdiction of Supreme Court.

The Supreme Court shall be a court of review and shall exercise exclusive appellate jurisdiction in the following cases:

> (1) All cases involving the construction of a treaty or of the Constitution of the State of Georgia or of the United States and all cases in which the constitutionality of a law, ordinance, or constitutional provision has been drawn in question; and

* * *

28 U.S.C. § 1257(a)

§ 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

* * *

28 U.S.C. § 2403(b)

§ 2403. Intervention by United States or a State; constitutional question

* * *

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

O.C.G.A. § 13-3-44(a) (1981).

13-3-44. Effect of promise which is reasonably expected to induce action, etc., by promisee or third person; requirement as to proof of reliance in cases of charitable subscriptions or marriage settlements.

(a) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

* * *

9-11-65. Injunctions and restraining orders.

(a) *Interlocutory injunction.*

(1) NOTICE. No interlocutory injunction shall be issued without notice to the adverse party.

(2) CONSOLIDATION OF HEARING WITH TRIAL ON MERITS. Before or after the commencement of the hearing of an application for an interlocutory injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for an interlocutory injunction which would be admissible upon the trial on the merits shall become a part of the record on the trial and need not be repeated upon the trial. This paragraph shall be construed and applied so as to save any rights of the parties which they may have to trial by jury.

(b) *Temporary restraining order; when granted without notice; duration; hearing; application to dissolve or modify.* A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if:

(1) It clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition; and

(2) The applicant's attorney certifies to the court, in writing, the efforts, if any, which have been made to give the notice and the reasons supporting the party's claim that notice should not be required.

Every temporary restraining order granted without notice shall be endorsed with the date and hour of issuance, shall be filed forthwith in the clerk's office and entered of record, and shall expire by its terms within such time after entry, not to exceed 30 days, as the court fixes, unless the party against whom the order is directed consents that it may be extended for a longer period. In case a temporary restraining order is granted without notice, the motion for an interlocutory injunction shall be set down for hearing at the earliest possible time and shall take precedence over all matters except older matters of the same character; when the motion comes on for hearing, the party who obtained the temporary restraining order shall proceed with the application for an interlocutory injunction; and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification; and in that event the court shall proceed to hear and determine the motion as expeditiously as the ends of justice require.

(c) *Security*. As a prerequisite to the issuance of a restraining order or an interlocutory injunction, the court may require the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered

by any party who is found to have been enjoined or restrained wrongfully. A surety upon a bond or undertaking under this Code section submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the persons giving the security if their addresses are known.

(d) *Form and scope of injunction or restraining order.* Every order granting an injunction and every restraining order shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive notice of the order by personal service or otherwise.

(e) *When inapplicable.* This Code section is not applicable to actions for divorce, alimony, separate maintenance, or custody of children. In such actions, the court may make prohibitive or mandatory orders, with or without notice or bond, and upon such terms and conditions as the court may deem just.

Supreme Court, U.S.
FILED
NOV 22 2000
CLERK

(2)

No. 00-706

In The

Supreme Court of the United States

HOGAN MANAGEMENT SERVICES, P.C.,

Petitioner,

v.

JOSEPH A. MARTINO, M.D., d/b/a
NORTH GEORGIA ORTHOPAEDICS, P.C.,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID L. MOSS
Counsel of Record
Suite 1300, First Tennessee Bank Building
701 Market Street
Chattanooga, Tennessee 37402
(423) 756-4050

Attorney for Respondents North Georgia Orthopaedics, P.C. and Joseph A. Martino, M.D.

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The Petitioner is Hogan Management Services, P.C. The Respondents are Joseph A. Martino, M.D., and North Georgia Orthopaedics, P.C. North Georgia Orthopaedics, P.C. has no parent corporation and no publicly held company owns 10% or more of North Georgia Orthopaedics, P.C.'s stock.

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STATEMENT OF THE CASE

1. Procedural History

This case involves the construction of restrictive covenants contained in a private contract of employment under Georgia law. Petitioner Hogan Management Services, P.C. ("Hogan") filed suit against Respondents North Georgia Orthopaedics, P.C. ("NGO") and its president, Joseph A. Martino, M.D. ("Dr. Martino") (collectively referred to as "Respondents"), alleging violations of restrictive covenants contained in the employment contract between Hogan and NGO (the "Contract") and seeking injunctive relief.

On August 4, 1995, the Superior Court of Forsyth County, Georgia issued a TRO restraining NGO and Dr. Martino from competing with, or soliciting any patients of, Hogan until an interlocutory hearing could be held. The trial court refused Dr. Martino's request that Hogan be ordered to post a bond for damages caused by the TRO. NGO and Dr. Martino answered the complaint stating that the restrictive covenants were illegal and unenforceable as a matter of law, raising a number of affirmative defenses including Hogan's breach of contract, fraud, unclean hands and estoppel. Dr. Martino asserted a counterclaim for his damages caused by the wrongful restraint.

At the interlocutory hearing on September 5, 1995, evidence was presented regarding the duration, scope of activity, and territorial limits of the restrictive covenants, and the effect upon the public if the restrictive covenants were enforced. Additionally, the trial court heard the

evidence concerning Hogan's breaches, unclean hands and other defenses to the injunctive relief sought.

On October 16, 1995, the trial court entered an Order dissolving the TRO and dismissing Hogan's complaint. Based upon long-standing Georgia Supreme Court precedent, the trial court found as a matter of law that *both* the non-compete and non-solicitation clauses were unreasonable, void and unenforceable. The trial court found as a matter of fact that the Contract did not involve the sale of a business and, following binding Georgia precedent, refused to "blue pencil" the illegal covenants.

Hogan appealed to the Georgia Supreme Court. On motion of NGO and Dr. Martino, the case was transferred to the Georgia Court of Appeals. Hogan's appeal was then dismissed by the Georgia Court of Appeals because Dr. Martino's counterclaim was still pending, Hogan had failed to obtain certification of less than all issues pursuant to O.C.G.A. § 9-11-54(b), and, therefore, the appeal was premature.

On remand to the trial court, the parties filed cross-motions for summary judgment on the counterclaim. Hogan also moved the trial court for reconsideration of its October 16, 1995 Order dismissing the complaint. Ultimately, the trial court dismissed the counterclaim on the ground that the trial court's decision not to require Hogan to post a bond – even though Dr. Martino had requested one – barred Dr. Martino's cause of action. The court denied Hogan's motion for reconsideration of the October 16, 1995 Order, and, in an amended order, also rejected Hogan's constitutional claim.

Hogan again appealed the trial court's October 16, 1995 Order, and Dr. Martino cross-appealed the trial court's dismissal of his counterclaim. On March 3, 2000, the Court of Appeals decided both cases. With respect to Hogan's appeal, the court held that Hogan's appeal was moot. The eighteen (18) month time period applicable to the restrictive covenants had expired. Under Georgia law, it was not tolled during the pendency of litigation, and could not be judicially tolled. Thus, Hogan could not obtain the injunctive relief it sought in its complaint. Accordingly, the court affirmed the trial court's October 16, 1996 Order dismissing Hogan's complaint.[1]

Regarding Dr. Martino's cross-appeal, the court of appeals reversed the trial court's dismissal of the counterclaim. The court held that Dr. Martino's cause of action for wrongful restraint under O.C.G.A. § 9-11-65(c) was not barred by the trial court's refusal to order Hogan to post a bond. The court further held that the restraint was wrongful as a matter of law, and granted Dr. Martino's motion for partial summary judgment as to Hogan's liability for wrongful restraint. It remanded the case for trial on the issue of Dr. Martino's damages. *Hogan Management Services, P.C. v. Martino*, 242 Ga. App. 791, 530 S.E.2d 508 (2000), *cert. denied*. Hogan's petitions for certiorari to the Georgia Supreme Court were denied, as were Hogan's motions for reconsideration. Hogan now petitions this Court for certiorari.

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[1] The court of appeals also held that, even if the appeal was not moot, the trial court was correct in finding that the restrictive covenants were unenforceable as a matter of law.

2. The Trial Court's Order Which The Georgia Appellate Courts Affirmed

The Contract which is the subject of this litigation contains two restrictions: (a) a covenant not to compete, and (b) a covenant not to solicit. The covenants are found in Paragraph 7 which provides in pertinent part:

> *Covenant Not to Compete.* In the event of termination of this Agreement, Provider agrees that Provider will not, within a period of eighteen (18) months, engage in the practice of medicine or surgery within a radius of ten (10) miles of any ***practice site(s)*** at which Provider has practiced under this Agreement . . . Provider further agrees not to solicit ***any patients of the Corporation*** to become the patients of Provider. . . . (emphasis added)

The trial court properly noted that contracts in general restraint of trade which tend to lessen competition are against public policy and void under the Georgia Constitution. Ga. Const. Art. III, Sec. IV, Para. V(c) (1983); O.C.G.A. § 13-8-2. Restrictive covenants contained in employment contracts are considered to be in partial restraint of trade and will be upheld *only* if strictly limited in time, territorial effect and scope of activity such that they reasonably protect the interests of the party in whose favor it is imposed, and do not unduly prejudice the interests of the public. *W. R. Grace & Co. v. Mouyal,* 262 Ga. 464, 422 S.E.2d 529 (1992). A restrictive covenant is unenforceable as an unreasonable restraint on trade if, at the time the contract is formed, it is *indefinite* or if it is *overbroad* as to time, territorial limitation or scope of

activities prohibited. *Koger Properties v. Adams-Cates Company*, 247 Ga. 68, 274 S.E.2d 329 (1981); *Durham v. Stand-By-Labor*, 230 Ga. 552, 198 S.E.2d 145 (1973).

Regarding the non-compete clause, the trial court found that the territorial scope was indefinite and unenforceable. It depended upon the location of "practice site(s)" which were undefined in the Contract,[2] and which were not capable of determination at the formation of the Contract.[3]

Regarding the non-solicitation clause, the trial court found it unreasonable because it did not contain the necessary time limitation, *Marcoin, Inc. v. Waldron*, 244 Ga. 169, 259 S.E.2d 433, 434 (1979), and because the prohibition against solicitation of "any" of an employer's customers, whether or not a relationship existed between

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[2] Hogan's implication that the restrictive covenants were "negotiated" is disputed. Hogan and its attorney drafted the restrictive covenant. Hogan could have defined the term "practice site(s)" to mean specific locations, but failed to do so.

[3] That the term is vague and ambiguous is evidenced by Hogan's own inability to locate the "practice site(s)," even after the contract had been terminated. Under the guise of "clarification," Hogan alleged there were eight (8) "practice sites." One was an office operated by Healthsouth, five were hospitals that Hogan did not operate or manage, and one was a hospital in downtown Atlanta where Dr. Martino had never furnished any services, and apparently Dr. Hogan had not either. Hogan did not show any legitimate business interest to be protected in Atlanta. Later, in its complaint, Hogan claimed the term meant two offices and one hospital located in Forsyth County. As the trial court stated, Hogan's willingness to be more reasonable later did not cure the overbreadth of the restrictive covenant as written.

the customer and the former employee, is an unreasonable and overbroad attempt to protect the employer's interest, even if confined to a specific geographic area. *W. R. Grace*, 262 Ga. 464, 422 S.E.2d 529, 532 (1992).

The trial court refused to sever the covenants, or to "blue pencil" them. Under Georgia law, courts may not sever or blue pencil illegal restrictive covenants except when they are ancillary to the sale of a business. *Ward v. Process Control Corp.*, 247 Ga. 583, 277 S.E.2d 671 (1981).[4] The trial court found as a matter of fact that the Contract did not involve the sale of a business.[5]

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[4] Even in cases involving the sale of a business, Georgia courts do not have a license to reform or rewrite restrictive covenants under the guise of blue-penciling. "Blue-penciling marks, but it does not write . . . it may not rewrite a contract void for vagueness, making it definite by designating a new, clearly demarcated area." *Hamrick v. Kelley*, 260 Ga. 307, 392 S.E.2d 518, 519 (1990) (court refused to rewrite restrictive covenants ancillary to a sale of a business which were vague as to territorial application). Thus, "blue penciling" would not help Hogan. As the trial court found, both the non-compete and the non-solicitation clauses are void on independent grounds. Even if severed, they are both illegal. Moreover, the non-compete clause is vague in its territorial application and, like in *Hamrick*, it cannot not be salvaged even with the "blue pencil."

[5] The trial found that Paragraphs 11 and 12 of the Contract expressly state that the Contract is not intended to create a partnership or joint venture between Hogan and Respondents. Consideration did not flow equally between the parties – Dr. Hogan made many times the fee paid to NGO. There were no equal rights of control. Respondents acquired no equity interest in Hogan. The Contract does not contain any buy-in provision. Respondents held no official status with Hogan, they were not

REASONS FOR DENYING THE WRIT

1. This Court Lacks Jurisdiction

For this court to have jurisdiction, a live controversy must exist at all stages of review. This court may not review cases that are moot. *See DeFunis v. Odegaard*, 416 U.S. 312, 94 S. Ct. 1704, 40 L.Ed.2d (1974). Also, this court is barred from reviewing cases wherein the state court's decision is based upon adequate non-federal grounds, either substantive or procedural. *Murdock v. Memphis*, 20 Wall. 590, 22 L.Ed. 429 (1875); *Henry v. Mississippi*, 379 U.S. 443, 85 S. Ct. 564, 13 L.Ed.2d 408 (1965).

Under Georgia law, dismissal of a moot appeal is mandatory. O.C.G.A. § 5-6-48(b)(3). The Georgia Court of Appeal held that Hogan's appeal of the trial court's October 16, 1995 Order was moot because, by the time Hogan perfected its appeal, the eighteen (18) month time period applicable to the illegal restrictive covenants had expired. Under Georgia law, the pendency of litigation over restrictive covenants does not toll the running of the contractual time period during which the covenants, if valid, would apply. *Coffee System of Atlanta v. Fox*, 227 Ga. 602, 182 S.E.2d 109 (1971); *see also Electronic Data Systems Corp v. Heinemann*, 268 Ga. 755, 493 S.E.2d 132 (1997). Where a complaint seeks injunctive relief, appeals taken after the expiration of the contractual time period are

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owners of or shareholders in Hogan, and had no voting rights in Hogan. Respondents had no authority to hire or fire employees. Respondents' benefits and responsibilities were established by the Contract. There were no reciprocal restrictive covenants extracted from Hogan or its sole physician employee, Dr. Hogan.

moot. *Southern Intermodal Logistics, Inc. v. Taylor Maid Transportation, Inc.*, 255 Ga. 390, 338 S.E.2d 678 (1986). Moreover, in the absence of a contractual tolling provision, judicial tolling is prohibited. "Such an extension would in effect rewrite the [time period] of the agreement. Courts do not make contracts for the parties." *Coffee System*, 182 S.E.2d at 110.

The essence of Hogan's Petition is that Georgia courts improperly "classify" restrictive covenants as ancillary to employment or the sale of a business in deciding whether to "blue pencil" them. But the cases applicable to the mootness issue *do not* involve such "classification." The cases holding that appeals taken after the expiration of the contractual time period are moot, and barring tolling (either judicially or by operation of law), apply to *all* restrictive covenants, whether they are ancillary to employment or to the sale of a business. *Coffee Systems, supra* (employment contract – no judicial tolling); *Southern Intermodal, supra* (sale of a business – no judicial tolling). In other words, the Georgia courts in this case did not engage in "classification" in ruling that Hogan's appeal is moot. Thus, there are adequate non-federal grounds supporting the Georgia courts' ruling, and this Court lacks jurisdiction to review it.

Also, there are adequate non-federal grounds for the Georgia courts' ruling regarding the cross-appeal of Dr. Martino. The Georgia Court of Appeals reversed the trial court's dismissal of Dr. Martino's counterclaim because the trial court incorrectly interpreted a Georgia statute, O.C.G.A. § 9-11-65(c). Hogan has not raised any federal constitutional issue with respect to court of appeals'

interpretation of that statute. Since Hogan's appeal concerning the restrictive covenants is moot, and since the Georgia law governing the mootness issue does not involve any constitutionally challenged classification, the trial court's October 16, 1995 Order has been affirmed and is final. That final Order states that the restrictive covenants were void and unenforceable as a matter of law. That is an adequate non-federal basis for the Georgia Court of Appeals' holding that the TRO was wrongful as a matter of law, and that Dr. Martino is entitled to partial summary judgment on the issue of liability for a wrongful restraint under O.C.G.A. § 9-11-65(c).

Hogan's Petition for Writ of Certiorari is meritless, especially in light of the obvious absence of jurisdiction. It should be denied.

2. Even on the Merits, Hogan's Constitutional Arguments are Frivolous

Hogan is *not* arguing that the illegal and void restrictive covenants are, in fact, legal. Rather, Hogan wants the courts to resurrect those void covenants by judicially rewriting them to make them legal. The Georgia courts have refused at every level.

In a nutshell, Hogan claims that Georgia law, which prohibits "blue-penciling" of illegal restrictive covenants in employment contracts, but allows it when the covenants are ancillary to the sale of a business, operates as an unconstitutional "classification" based upon an "irrebutable presumption" that employment contracts are "adhesive contracts." Hogan claims that such "classification" violates substantive due process and deprives it of equal

protection of the laws. For the reasons stated below, Hogan's constitutional arguments are bogus.

a. Hogan Has Not Been Denied Due Process

Hogan's substantive due process claim is facially absurd. As a threshold matter, Hogan must show that Georgia law impacts some fundamental right of Hogan rooted in the Constitution. *Michael H. v. Gerald D.*, 491 U.S. 110, 122, 109 S. Ct. 233, 105 L.Ed.2d 91 (1989), *reh. den.*, 492 U.S. 937 (1989), *2nd reh. den.*, 499 U.S. 984 (1991), *mot. to amend den.*, 504 U.S. 905 (1992). Hogan has not shown that the U.S. Constitution establishes any fundamental right to have courts judicially edit private contracts and enforce *illegal* contract provisions that are void and unenforceable as against Georgia public policy. Respondents certainly are not aware of any such right, either expressed in the Constitution or in any case law.

Second, Hogan's contention that the alleged "classification" is based upon an "irrebutable presumption" that employment contracts are "contracts of adhesion" is not true. Any classification is based upon the employee's "unequal bargaining power," not because they are adhesive in every case. *See Watson v. Waffle House, Inc.*, 253 Ga. 671, 324 S.E.2d 175, 177 (1985). As the Georgia Supreme Court very practically observed, one who lacks the power to prevent his own termination, even an important employee, does not have equal bargaining clout with the employer who can fire him. *White v. Fletcher/Mayo/Associates*, 251 Ga. 203, 303 S.E.2d 746, 750 (1983).

Finally, even if Georgia's approach to the construction of restrictive covenants creates an irrebutable presumption, it does not violate due process. If the "irrebutable presumption" doctrine is still alive as applied to economic issues,[6] the test of constitutionality is whether the presumptions are arbitrary or lacking in rational justification. *Weinberger v. Salfi*, 422 U.S. 749, 768, 95 S. Ct. 2457, 45 L.Ed.2d 522 (1975).

In the present case, the test is easily satisfied. The compelling reasons supporting the Georgia law prohibiting "blue penciling" of restrictive covenants in employment agreements has been stated by the Georgia Supreme Court:

> For every [restrictive] covenant which finds its way into court, there are thousands which exercise an *in terrorem* effect on employees who respect their contractual obligations and on competitors who fear legal complications if they employ a covenantor, or who are anxious to maintain gentlemanly relations with their competitors. Thus, the mobility of untold numbers of employees is restricted by the intimidation of restrictions whose severity no court would sanction. If severance is generally applied, employers can fashion truly ominous covenants with confidence that they will be pared down

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[6] As one federal appeals court stated, "the irrebutable presumption doctrine was a strange hybrid of procedural due process and equal protection invented by the Supreme Court in the early 1970s and laid to rest soon after," and stating that *Vlandis v. Kline*, 412 U.S. 441 (1973), the leading case advancing the doctrine, was "effectively overruled" by *Salfi*. *Brennan v. Stewart*, 834 F.2d 1248, 1257 (5th Cir. 1988).

> and enforced . . . ." *Richard P. Rita Personnel Services, Inc. v. KOT*, 229 Ga. 314, 191 S.E.2d 79, 81 (1972).

The Georgia Supreme Court concluded that the reasons favoring "blue penciling" are not of sufficient weight to offset those reasons for refusing to apply the doctrine. "In short, we have weighed the 'blue-pencil' doctrine in the balance, and found it wanting." *Id.* Georgia courts have been asked to blue-pencil or sever restrictive covenants many times since and have declined. *See, e.g., Howard Schultz & Assoc. v. Broniec*, 239 Ga. 181, 236 S.E.2d 265, 268 (1977) *and cases cited therein*. Just a few years ago, in *Jackson & Coker, Inc. v. Hart*, 261 Ga. 371, 405 S.E.2d 253 (1991), the Supreme Court held that O.C.G.A. § 13-8-2.1, a statute which would have allowed blue-penciling of otherwise unenforceable restrictive covenants contained in employment contracts, was unconstitutional.

Georgia courts are permitted to "blue pencil" restrictive covenants ancillary to the sale of a business because the transaction is intended to transfer the seller's business prospects and goodwill, there is little risk of injury to the public, and the parties have equal bargaining position. *Jenkins v. Jenkins Irrigation, Inc.*, 244 Ga. 95, 259 S.E.2d 47 (1979). As the *Jenkins* court stated, such is not the case with employment contracts. *Id.* at 50.

The facts of this case provide a graphic textbook illustration of the *in terrorem* effect – i.e., illegal restrictive covenants used by an employer to intimidate an employee and restrain competition. The evidence at trial showed that for years Dr. Hogan was the only orthopaedic surgeon living in Forsyth County and had little

competition. In May 1994, Dr. Hogan met Dr. Martino, a young, Board-eligible and Fellowship-trained orthopaedic surgeon with spectacular credentials. He learned that Dr. Martino was about to move to Forsyth County, accept a highly paid position with Mountainside Medical Center in adjacent Pickens County ("Mountainside"), and open a satellite office in Forsyth County. Dr. Martino not only would cut off Dr. Hogan's flow of patients from Pickens County, he would be taking a third of the "call" at Baptist North (an important source of new patients and cases) and otherwise competing with him.

Hogan then lured Dr. Martino into the Contract and under restrictive covenants based upon fraudulent misrepresentations. The goal was to control and eventually eliminate the imminent competition which threatened Hogan's virtual monopoly upon orthopaedic medicine in Forsyth County. The record is filled with facts supporting these contentions. After the position at Mountainside was filled by another physician, Hogan terminated the contract – while "the ink was still wet" as Dr. Martino testified – and attempted to coerce Dr. Martino into taking a pay cut of 50% by claiming that Dr. Martino otherwise would be barred by the restrictive covenants from practicing in Forsyth County and virtually all of the surrounding counties, including places where Dr. Martino had never practiced before and where Hogan had no legitimate business interest.

This is *not* a case of Dr. Martino working for Hogan for years, and then quitting to set up a competing practice. Rather, Hogan fired Dr. Martino after only a few months knowing that if Dr. Martino refused to accept a 50% pay cut, he had only two choices: to move his family

out of their new home and out of North Georgia (which, as a practical matter, would permanently eliminate him as competition), or to compete and face expensive litigation with a wealthy entity such as Hogan. Dr. Martino chose the latter and, though he successfully challenged the enforceability of the illegal restrictive covenants, Dr. Martino was deprived of work for three months and still is being forced to incur thousands of dollars in legal expenses.

The Georgia law at issue is neither arbitrary nor unreasonable. It strikes the correct balance of minimizing restraints on trade, protecting employees from intimidation, and protecting legitimate interests of employers. The classification furthers the state's legitimate interest in preventing employers from stifling competition with overly broad restrictive covenants, and then counting on the courts to later make them reasonable. Under Georgia law, those employers who draft restrictive covenants that are definite and reasonable in scope will have them enforced. *See, e.g., Smith v. HBT, Inc.*, 213 Ga. App. 560, 445 S.E.2d 315 (1994). Those who get greedy and overreach will not have their covenants enforced. The burden is placed properly upon the employer to be reasonable and to avoid drafting illegal and punitive covenants. Under any level of scrutiny, Georgia's law prohibiting "blue penciling" of illegal restrictive covenants in employment agreements "fits" the policy that the classification serves.

In summary, Hogan has no constitutionally protected interest in the enforcement of illegal covenants in a private contract. The covenants are void from inception.

Moreover, the rationale supporting Georgia law is obviously reasonable and calculated to protect a legitimate state interest in competition. The alleged classification satisfies any requirements imposed by the Constitution, and Hogan's challenge to it on constitutional grounds is an exercise in futility.

b. Hogan Has Not Been Denied Equal Protection of the Law

For the same reasons, Hogan's equal protection claim lacks merit. Hogan has not shown that it is a member of a suspect class, or that any fundamental right has been impacted. Therefore, the constitutional test of an alleged illegal economic classification is whether it has any conceivable relationship to any legitimate state interest. *Williamson v. Lee Optical Company*, 348 U.S. 483, 75 S. Ct. 461, 99 L.Ed. 563 (1955).

The analysis is virtually the same as above, and will not be repeated in detail here. Suffice it to say that the Georgia Constitution is hostile to restraints on competition. The restrictive covenants at issue here are unreasonably vague and overbroad, and therefore void and unenforceable. Since this Contract did not involve the sale of a business, Georgia courts will not "blue pencil" the covenants to make them enforceable. The reason: to prevent the *in terrorem* effect. If "blue penciling" were allowed, employers like Hogan would get away with using illegal covenants to stifle competition, in contravention of public policy, and then rely upon the courts to pare them down and enforce them. *Rita Personnel*, 191 S.E.2d at 81.

In summary, Georgia law is reasonably calculated to protect a legitimate state interest grounded in the Georgia constitution. It does not violate due process or the equal protection clause of the U.S. Constitution. Thus, this Court should deny Hogan's petition and put a merciful end to this seemingly endless litigation.

CONCLUSION

For the foregoing reasons, this Court should deny Hogan's Petition for Writ of Certiorari, and award Respondents their costs and attorney fees.

Respectfully submitted,

DAVID L. MOSS
Counsel of Record
Suite 1300, First Tennessee Bank Building
701 Market Street
Chattanooga, Tennessee 37402
(423) 756-4050

Attorney for Respondents North Georgia Orthopaedics, P.C. and Joseph A Martino, M.D.

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No. 00-706

In The

Supreme Court of the United States

HOGAN MANAGEMENT SERVICES, P.C.,

Petitioner,

v.

JOSEPH A. MARTINO d/b/a
NORTH GEORGIA ORTHOPAEDICS, P.C.,

Respondent.

On Petition For Writ Of Certiorari To The Georgia Supreme Court

REPLY TO BRIEF IN OPPOSITION

RAFE BANKS III
Counsel of Record
BANKS, STUBBS, NEVILLE & CUNAT
309 Pirkle Ferry Road
Building F
Cumming, Georgia 30040
(770) 887-1209

BAYLOR B. BANKS
BAYLOR B. BANKS, Attorney at Law
3340 Peachtree Road
Suite 325
Atlanta, Georgia 30326
(404) 266-9195

Attorneys for Petitioner
Hogan Management Services, P.C.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY

I. Respondent Joseph A. Martino d/b/a North Georgia Orthopaedics, P.C. [hereinafter "Martino"] Has Misstated Rule of Law Used as Basis for Contending that This Court Lacks Jurisdiction Over Cross-Appeal.

On page 7 of his Brief in Opposition, Martino contends that the Court of Appeals' holding that the restrictive covenants were unenforceable constituted an "adequate" basis for a finding that the trial court's initial restraint had been "wrongful" under O.C.G.A. § 9-11-65(c). Martino then concludes that this Court lacks jurisdiction over the cross-appeal.

Martino's contention rests entirely on a misstated legal standard. The actual principle set forth in his cited cases is that this Court " . . . will decline to review state court judgments which rest on *independent and* adequate state grounds . . . " [emphasis added]. *Henry v. Mississippi*, 379 U.S. 443, 446, 85 S. Ct. 564, 567, 13 L. Ed. 2d 408 (1965). A finding of "wrongful" restraint resulting from partial severance of a restrictive covenant is wholly dependent upon a prior determination that Georgia law prohibits partial severance in that particular fact situation, which centers around the rule of law that Hogan contends is unconstitutional. Consequently, application of the true "independent and adequate" legal standard to the cross-appeal reveals that Martino's contention is meritless and should be summarily ignored.

II. This Court Has Jurisdiction of the Appeal Because Finding of Mootness By Court of Appeals Was In Absence of Fair or Substantial Support.

A. Assertion by Martino.

On page 8 of his Brief in Opposition, Martino asserts as follows:

> . . . the Georgia courts in this case did not engage in "classification" in ruling that [Petitioner Hogan Management Services, P.C. [hereinafter

"Hogan"]]'s appeal is moot. Thus, there are adequate non-federal grounds supporting the Georgia courts' ruling, and this Court lacks jurisdiction to review it.

B. "Without Any Fair or Substantial Support" Standard.

Adequate grounds did not exist for the Court of Appeals' finding of mootness. In reviewing another decision of the Court of Appeals of Georgia, this court found as follows:

> . . . the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice. 'Whether the constitutional rights asserted by the appellant were . . . given due recognition, by the (Court of Appeals) is a question to which the (appellant is) entitled to invoke our judgment, and this (she has) done in the appropriate substance and effect, as by putting forward non-federal grounds of decision that were without any fair or substantial support . . . (for) if non-federal grounds, plainly untenable, may be thus put forward successfully, our power to review easily may be avoided.' *Ward v. Board of Com'rs of Love County*, 253 U. S. 17, 22, 40 S. Ct. 419, 421, 64 L. Ed. 751 and cases cited.

Staub v. City of Baxley, 355 U.S. 313, 319, 78 S. Ct. 277, 280, 2 L. Ed. 2d 302 (1958).

C. Ruling By Court of Appeals Lacked Fair and Substantial Support.

1. Statutory Duty of Court of Appeals.

O.C.G.A. § 5-6-30 provides in pertinent point as follows:

> It is the intention of this article to provide a procedure for taking cases to the Supreme Court

> and the Court of Appeals . . . to that end, this article shall be liberally construed so as to bring about a decision on the merits of every case appealed and to avoid dismissal of any case *or refusal to consider any points raised therein*, except as may be specifically referred to in this article.

[emphasis added]. In *Felix v. The State*, 271 Ga. 534, 538, 523 S.E.2d 1, 5 (1999), the Georgia Supreme Court interpreted O.C.G.A. § 5-6-30 in clear and certain terms, "The General Assembly has made it clear that all points raised in an appeal are to be considered by the appellate court."

Felix mandates that the Court of Appeals was statutorily required to address every point of law relating to the issue of whether Hogan's appeal is moot. A thorough, studied conclusion that Hogan's appeal is moot is a necessary precedent to the application of O.C.G.A. § 5-6-48(b)(3). The O.C.G.A. § 5-6-48(b)(3) exception to O.C.G.A. § 5-6-30 does not become effective until a court has reviewed all points of law relating to the issue of mootness, and then has concluded that the issue is moot.

2. Points of Law Raised By Hogan in Regard to Mootness And Treatment of Those Points of Law By Court of Appeals.

Hogan asked the Court of Appeals to address three points of law which lead to the conclusion that the appeal is not moot: (1) the cross-appeal maintains the justiciability of the merits of the appeal, (2) a liquidation damages clause in Martino's employment contract provides an O.C.G.A. § 13-3-44(a) (1981)[1] definite and substantial

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[1] "Where a decision of this court overlooks and fails to give effect to a statute, the statute, and not the decision wherein such statute was overlooked, is controlling." *Pharr v. Woodall*, 226 Ga. 1, 2, 172 S.E.2d 404, 405 (1970). Thus, since the Supreme Court overlooked O.C.G.A. § 13-3-44 (1981) in the cases cited by Martino, the Court of Appeals was duty-bound to not consider

equitable remedy maintaining the appeal as a justiciable issue, and (3) O.C.G.A. § 13-3-44(a) (1981) allows the trial court to craft an equitable remedy for an expired covenant. The Court of Appeals declined to perform its statutory duty and did not address any of these three points of law in its decision.

3. Conclusion

It was not "fair" for the Court of Appeals to rule that Hogan's appeal was moot because the Court of Appeals neglected to perform its O.C.G.A. § 5-6-30 statutory duty to address Hogan's points of law regarding mootness. Further, the Court's finding lacked "substantial" support because the case law relied upon by the Court of Appeals is directly contrary to the statutory provisions of O.C.G.A. § 13-3-44(a) (1981), and, therefore, is not controlling authority on the question of mootness. Since the decision of the Court of Appeals lacks fair and substantial support, the Court of Appeals' finding of mootness is not an adequate non-federal ground to preclude this Court's jurisdiction on the constitutionality issues raised in the appeal.

In addition, the question of mootness itself is still a live controversy because the distinct possibility exists that, upon remand, the Supreme Court of Georgia would be statutorily bound to apply O.C.G.A. § 13-3-44(a) (1981) to this fact situation, which would eventually allow a trial court to craft an equitable remedy flowing from Martino's breach of the reasonable portion of the expired covenants.

III. Unequal Bargaining Power Alone Is Not Basis For Classification.

On page 10 of his Brief in Opposition, Martino asserts that unequal bargaining power alone accounts for the

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the cases as binding precedent and to look to O.C.G.A. § 13-3-44 (1981) as controlling authority, or, at the very least, to address this point of law in its decision.

classification of employers and purchasers of businesses. This contention misconstrues the relationship between *Richard P. Rita Personnel Services International, Inc. v. Kot*, 229 Ga. 314, 191 S.E.2d 79 (1972) and the classification at issue.

In *White v. Fletcher/ Mayo/ Associates, Inc.*, 251 Ga. 203, 208, 303 S.E.2d 746, 750 (1983), the Supreme Court of Georgia explained how the *Rita Personnel Services* doctrine was served by the classification:

> . . . we find that redrafting the covenants would create a serious danger of sapping the vitality of the Rita Personnel Services doctrine. Such redrafting it [sic] would encourage a purchaser of an existing business to genteelly *coerce* an employee of the acquired business to agree to an employment contract which contains noncompetition covenants and which appears to be the result of a true bargain *but is actually a contract of adhesion*. See note 1 supra; Restatement (2d) of Contracts § 164 [sic][2] Comment b (1981) (*Courts will not redraft overbroad covenants extracted by taking advantage of dominant bargaining power.*).

[emphasis added]. In other words, the *in terrorem* effect cited by the *Rita* Court takes place through the enforcement of adhesion contracts. Therefore, the Georgia Supreme Court effectively created an irrebuttable presumption that employment contracts in these cases are contracts of adhesion.[3]

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[2] If one reviews note 1, it becomes obvious that this citation contains a typographical error and that the Supreme Court of Georgia meant to cite Restatement (2d) Contracts § 184, Comment b.

[3] In Enumeration of Error Number Two in his Appellant's Brief, Hogan asked the Court of Appeals, in a question of first impression, whether the *White* Court actually created a rebuttable presumption of fact that an employment contract was an adhesion contract. As with his contentions regarding

In addition, other Supreme Court of Georgia precedent concerning one doctor working under the terms of an employment contract for another doctor demonstrates that unequal bargaining power alone does not render a contract voidable:

> One may not 'void a contract on grounds of duress merely because he entered into it with reluctance, the contract is very disadvantageous to him, *the bargaining power of the parties was unequal* or there was some unfairness in the negotiations preceding the agreement' 17 C.J.S. 944, s 168.

[emphasis added]. *Tidwell v. Critz*, 248 Ga. 201, 204, 282 S.E.2d 104, 108 (1981). In addition:

> In determining whether undue influence has been exerted, the courts will closely scrutinize . . . facts which show that the defendant 'created the relationship of dominance' over the plaintiff . . . not all influence can be said to be undue 'since a person is not prohibited from exercising proper influence to obtain a benefit to himself.'

[citations omitted]. *Id.*, 248 Ga. at 206, 282 S.E.2d at 109. Since unequal bargaining power alone does not render a contract voidable, the only logical interpretation of the *Waffle House* rationale[4] is that classification of an

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mootness, the Court of Appeals declined to perform its O.C.G.A. § 5-6-30 statutory duty to address this question, which apparently constitutes a holding that an employer may not rebut such a presumption.

[4] "The rationale behind the distinction in analyzing covenants not to compete is that a contract of employment inherently involves parties of unequal bargaining power to the extent that the result is often a contract of adhesion. On the other hand, a contract for the sale of a business interest is far more likely to be one entered into by parties of equal footing. [*citing White, supra*]. *Watson v. Waffle House, Inc.*, 253 Ga. 671, 671-72, 324 S.E.2d 175, 177 (1985).

agreement as an employment contract creates an irrebuttable presumption that the contract is an adhesion contract.

IV. Indefinite Provisions Do Not Render Restrictive Covenants Unenforceable.

On pages 4-6 in his Brief in Opposition, Martino spends considerable time arguing that the provisions of the restrictive covenants were vague, indefinite, etc. and could not be enforced for this reason, regardless of classification. The Court of Appeals did not address this question in its opinion. Had the Court of Appeals considered this question, it would have had to address the argument that O.C.G.A. § 13-3-44(a) (1981) would allow partial enforcement.

In *Pepsi Cola Bottling Co. v. First Natl. Bank of Columbus*, 248 Ga. 114, 116, 281 S.E.2d 579, 581 (1981), the Supreme Court of Georgia applied O.C.G.A. § 13-3-44(a) (1981) modern equitable promissory estoppel to an indefinite contractual provision and concluded:

> . . . the problem with this agreement stems from the fact that the bank's promise to forbear setoff *lacks a term of duration which, arguably, renders the contract too indefinite to enforce. . . . We find this omission not controlling* . . . [citations omitted].

[emphasis added]. The *Pepsi Cola* Court's solution squares entirely with the observation from 3 Corbin on Contracts § 8.11 (rev. ed. 1996 Holmes) regarding modern equitable promissory estoppel (codified in Georgia as O.C.G.A. § 13-3-44(a) (1981)) that:

> Cases arose with defects in contract formation . . . courts perceived the need for corrective justice between the parties . . . Rather than focusing on the promise as an element of mutual assent, the analysis at this stage turned to the notion of a promissory commitment centering on the promisee's right to rely and the promisor's duty to prevent foreseeable reliance. **The required**

"promise" was not viewed in terms of a "clear and definite" offer/promise.

[emphasis added]. As a result, a Georgia appellate court applying O.C.G.A. § 13-3-44(a) (1981) to this case would not find that the restrictive covenants are too vague or indefinite to be partially enforced.[5]

V. No Dispute Regarding Negotiation of Restrictive Covenants.

In footnote 2 on page 5, Martino disputes that the restrictive covenants were negotiated. In his Appellees' Brief, Martino admitted that the *"[restrictive] covenants were not disturbed during negotiations."* [emphasis added] (page 29). Hogan fails to see any dispute on this question; however, the salient point remains that the parties agree that *in fact* the contract in this case is not an adhesion contract.

VI. Liberty to Contract Grounded in Constitution.

On page 10 of his Brief in Opposition, Martino contends that the contract at issue does not involve a right worthy of review. To the contrary, it is a deeply rooted principle that the freedom to contract is a Fourteenth Amendment "liberty" which may not be arbitrarily restrained by a State. *Miller v. Wilson*, 236 U.S. 373, 35 S. Ct. 342, 59 L. Ed. 628 (1915).

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[5] In Enumeration of Error Number 5 in his Appellant's Brief, Hogan asked the Court of Appeals, as an issue of first impression, to apply O.C.G.A. § 13-3-44(a) (1981) to the fact situation surrounding the restrictive covenants in this case. As with his points of law regarding mootness, the constitutionality arguments, and the possibility of the rule of law creating a rebuttable presumption of an adhesion contract, the Court of Appeals declined to adhere to its O.C.G.A. § 5-6-30 statutory duty to address this enumeration of error.

VII. Martino's Presentation of Argument as "Facts".

On pages 12-14 of his Brief in Opposition, Martino provides an argumentative recital of what he characterizes as "the facts of the case". Suffice it to say that Hogan has counter-arguments to Martino's arguments; however, the pertinent point remains that, in light of Martino's agreement that the contract at issue is not an adhesion contract, Martino's argumentative recital is not germane to the question raised in the Petition: is the Georgia Supreme Court's rule of law unconstitutional?

VIII. Partial Severance Not Prohibited By Georgia Constitution.

On page 15 of his Brief in Opposition, Martino implies that partial severance of restrictive covenants ancillary to employment contracts is prohibited by the Georgia Constitution because the Georgia Constitution is "hostile" to restraints on competition. This contention misses the core essence of both partial severance and the Georgia Constitution.

6A Corbin on Contracts § 1390, page 67 (1962) sets forth "justice" as the driving force behind partial severance by stating as follows:

> With respect to partial illegality, the real issue is whether partial enforcement is possible without injury to the public and *without injustice to the parties themselves.*

[emphasis added].

The Preamble to the Georgia Constitution provides in relevant part as follows: "To . . . insure justice to all . . . we the people of Georgia . . . do ordain and establish this Constitution." As a fundamental fiber coursing throughout the Georgia Constitution, insuring "justice to all" is a policy which must be carried out in the enforcement of Constitutional provisions.

The express language of O.C.G.A. § 13-3-44(a) (1981) directs a court to enforce a promise to the degree necessary to avoid injustice.[6] The Georgia Constitution is far from hostile to this proposition; the Preamble to the Georgia Constitution demonstrates that the people of Georgia demand it. Consequently, the Georgia Constitution is not intrinsically hostile to partial severance.

CONCLUSION

For the above and foregoing reasons, as well as all of the reasons contained in the Petition for Certiorari, the writ of certiorari should be granted.

Respectfully submitted,

RAFE BANKS III
Counsel of Record

BANKS, STUBBS, NEVILLE & CUNAT
309 Pirkle Ferry Road
Building F
Cumming, Georgia 30040
(770) 887-1209

BAYLOR B. BANKS

BAYLOR B. BANKS,
Attorney at Law
3340 Peachtree Road
Suite 325
Atlanta, Georgia 30326
(404) 266-9195

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[6] In the Restatement (2d) Contracts, Section 90 (codified verbatim in Georgia as O.C.G.A. § 13-3-44(a) (1981)) sets forth the general principle of modern equitable promissory estoppel; Section 184(2) is the specific application of that principle to restrictive covenants: justice is achieved by enforcing a covenant's reasonable restraints if the person seeking enforcement did not take advantage of dominant bargaining power.